

**What Explains the Differences in Response by the
International Community to the issues of State Failure,
Illegal Fishing
Hazardous Waste Dumping and Piracy off the Coast of
Somalia?**

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University of Canterbury
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Abstract

In the last decade of the 20th Century Somalia made the headlines around the world as the place where a UN force had been withdrawn from due to losses inflicted on US and other troops by members of groups associated with two warlords. In the latter part of the first decade of the 21st Century Somalia was again in the global headlines, but this time associated with acts of piracy committed off its coastline.

Behind these headlines lay a complex mixture of problems stretching back as far as the early colonisation of the lands that became Somalia and populated with western European concepts ill suited to the peoples of those lands. The loss of effective government opened the door to neo colonial issues of illegal fishing and hazardous waste dumping that contributed to the piracy problem. Finely interwoven amongst all these issues runs a thread of international law.

This thesis examines that thread as it runs through the concept of state failure and asks if it is a legal term and what legal consequences, if any, are attached to it. It examines the international legal frameworks that support fishing and hazardous waste dumping and seeks to understand why they have not prevented illegal fishing and the illegal dumping of hazardous waste off the coast of Somalia.

This thesis then examines the concept of piracy as applied to Somalian pirates and seeks answers to questions as to what it is and how it has been applied. It looks at the use of private security as a response and seeks to find the legitimation for their actions in relation to pirates.

Sewn throughout is a comparison of responses and suggestions for improvement to international law.

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Professor Karen Scott for her breadth of knowledge of international law and the law of the sea. It cannot have been an easy task for her to supervise a thesis that covers four topic areas, each of which could well be a thesis on their own, in the hands of a student struggling with content and structure.

I would also like to thank all the authors of the works that have contributed to the formation of the thesis for the ideas and willingness to commit them to paper. For the law librarians for their unfailing support. To my office colleagues with whom many hours were spent in vibrant intellectual discussion not at all related to the topics, Chat Le Nguyen and Hamed Tofagnsaz.

I must also thank my family for their support and encouragement, particularly my wife whose belief in my abilities often exceeded my own and to whom I must apologise to for countless boring conversations about pirates and the international legal system.

Note on style

Where possible, this thesis has followed the New Zealand Law Style Guide.¹ This thesis differs in respect to the format of headings, which have been numbered rather than listed alphabetically for the purposes of clarity. The style guide did not cover some of the sources used in researching of this thesis. In these cases, citation has been made consistently with the style of the guide.

¹ G McLay, C Murray and J Orpin New Zealand Law Style Guide (2nd ed, Thomson Reuters, Wellington, 2011).

Abbreviations

AU	African Union
Basel Convention	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989
CIL	Customary International Law
Code of Conduct	FAO Code of Conduct for Responsible Fisheries
Compliance Agreement	Agreement to Promote compliance with International Conservation and Management measures by Fishing Vessels on the High Seas
CPCs	Cooperating Non-Contracting Parties
EEZ	Exclusive Economic Zone
EC	European Community
EIAs	Environmental Impact Assessments
EU	European Union
EU NAVFOR	European Union Naval Force
FAO	Food and Agriculture Organization of the United Nations
FAO IPOA-IUU	Food and Agricultural Organisation of the United Nations International Plan of Action Against Illegal Unregulated and Unregistered Fishing.
FOC	Flags of convenience

FSA	The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks
HDC	Harvard Draft Convention on Piracy
HS	High Seas
ICC	International Criminal Court
ICJ	International Court of Justice
ICOC	International Code of Conduct for Private Security Service Providers
ICU	Islamic Courts Union
ILC	International Law Commission
IMO	International Maritime Organisation.
IOTC	Indian Ocean Tuna Commission
ITLOS	International Tribunal for the Law of the Sea
LDC	London Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Material And Their Disposal
MCS	Monitoring Control and Surveillance
MEAs	Multilateral Environmental Agreements
MOU	Memorandum of Understanding
MOWCA	Maritime Organisation for West and Central Africa
OAU	Organisation of African Unity

OECD	Organisation for Economic Co-operation and Development
PA	Precautionary Approach
PCASP	Privately Contracted Armed Security Personnel
PMSC	Private Military Security Companies
POC	Ports of Convenience
Protocol	1996 Protocol to the Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matter 1972
PSC	Private Security Company
RFMO	Regional Fisheries Management Organisation
SC	Security Council
SG	Secretary General of the United Nations
SIOFA	Southern Indian Ocean Fisheries Agreement
SUA	Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988
TFG	Transitional Federal Government
The Charter	The Charter of the United Nations
TNG	Transitional National Government
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Seas
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme

UNGA	United Nations General Assembly
UNMIK	United Nations Interim Administration Mission in Kosovo
US	United States of America
VPD	Vessel Protection Detachments

Chapter 1

1 Introduction

I am the Horn of Africa
I am now a war-torn ravished nation
Very little for my people
All seeking a new location
(Helwaa)¹

Somalia is now the landmass known as the Horn of Africa. To the west lies the vast area of the Indian Ocean. To the north lies the Gulf of Aden, the Red Sea, and the entrance to the Suez Canal that provides access to the Mediterranean Sea. Situated as it is, it has significant strategic value as a protector of access to ports on the Red Sea that are responsible for the flow of oil to the international community as well as the flow of commerce to Europe from developing Asian nations and from Europe to those same nations. The waters that surround the Horn particularly on the Indian Ocean side are home to many species of valuable fish stock.² The currents that well up just off the coast provide rich nutrients for these fish and have provided a source of food security as well as exports for Somalia.³

Any loss of stability within its borders is seen as a threat to the safe flows of both oil and commerce. Its value therefore to the Western World does not lie in and of

¹ Joseph Cachia “Comical...If it weren't so sad.” (2014) Malta

² Mahamuda Bawumia and Rashid Sumaila “Fisheries, Ecosystems and Piracy: A Case Study of Somalia” 2010 Working Paper (2010-04) The University of British Columbia at p6.

³ Mohammed Waldo “The Two Piracies in Somalia: Why the World Ignores the Other” *Wardheer News* (8 January 2009) at p3.

its self, but in the Western Worlds interest in the oil and commerce. This state of affairs is no different to how it has been treated by the Western world since the arrival of the Europeans in Africa. As is discussed in Chapter 2, the colonisers divided the land and separated the peoples for their own ends. The Cold War protagonists used Somalia as a tool in their battle for global domination.

Somalia attempted to set its own course during the period following decolonisation. This was interrupted by the overthrow of the government by coup d'état and what followed was a period of repression by the new government who was courting one or other of the Cold War powers to remain in power. The collapse of the Cold War and a change in the ideology behind how aid funding was allocated saw the reigning government unable to sustain its system of patrimony. The following overthrow of the government lead parts of the country into more than two decades of turmoil.⁴

While parts of the interior of the country were in a phase of prolonged disruption, overseas fishing fleets were heavily fishing the waters off the coast. It is alleged that the value of fish taken out of these waters was in excess of USD 300million per annum.⁵

The waters were also being used as a dump for the waste produced by the Western World.⁶

A response to the ongoing insecurity within the country and the lack of effective government to protect the waters for the artisanal fishermen from overfishing and the dumping of waste led Somalis to take to the waters to protect what was theirs. This resulted in acts of piracy being committed against trawlers and small commercial vessels that were supplying aid to Somalia. Success followed success, the targets grew in size, the waters off the coast become dangerous for larger

⁴ Jose Pureza and others "Do States Fail or Are They Pushed? Lessons Learned From Three Former Portuguese Colonies" 2007 273 Oficina do CES at pp1-3.

⁵ Johann Hari "You are being lied to about pirates: Some are clearly just gangsters. But others are trying to stop illegal dumping and trawling" (2009) United Kingdom at p2.

⁶ See Chapter 4 for a discussion on this topic in full.

commercial vessels that were hijacked, and the crews held to ransom. This success drew ever more pirates as the ransoms grew in size.⁷

Eventually the problem of piracy developed to such a size that the international community was forced to respond. Several joint naval task forces were dispatched to the region and there was a flurry of international action and condemnation for the pirates' actions. Merchant vessels were armed with security guards to protect the vessels and the incidents of piracy declined.⁸

Woven throughout this tale is a thin thread of international law that struggled to deal with a state that had lost effective government. Somalia became labelled as a 'failed' or 'collapsed' State. While this is a political label, there are consequences for its use. The signification that a state has lost effective government, or is a failed state, limits its ability to form international relationships, to partake in voting within international institutions and indicates that it is unable to supply basic public goods for its citizens. A further exploration of these terms and consequences is discussed in Chapter 2.

This thesis investigates international law surrounding the situation, as it existed in Somalia post 1991 to the present. This thesis utilises legal analysis to examine four of the major areas of international law that have had an affect on Somalia. These are the legal concept of a state and asks whether or not there are legal consequences to the use of the term 'failed state', the illegal fishing and the international fishing regime and whether it could have prevented the illegal fishing from occurring; the dumping of hazardous waste and asks could it have been prevented and looks at the use of international law to suppress piracy.

Chapter 2 examines the reasons behind the seemingly high rate of failure in African States. It looks particularly at Somalia as a state and explores why it has lost effective government. It then examines the concept of a State, how States come into being and the legal consequences of being a State. The term 'failed'

⁷ D Cronji "The Pirates of Somalia, Maritime Bandits or Warlords of the High Seas?" (Stellenboch University, 2009)

⁸ Milena Sterio "Fighting Piracy: why more is needed" 2009-2010 33 Fordham Int'l L. J. 372.

State and all its derivatives are examined as to what they actually mean. It asks what has actually failed in a 'failed' State and searches for possible legal consequences attached to the use of that term. It explores the possibility of one of the regions of Somalia seceding as a consequence of Somalia's failure.

The purpose of Chapter 3 is to examine the international fisheries regime and how it is applied in the case of Somalia. It asks whether the lack of a declared Economic Exclusion Zone has affected whether or not the fishing that occurs off the Somali coast is illegal. There are significant international legal agreements that cover international fishing. These agreements are meant to stop the fishing in sovereign waters of another state unless licensed. The responses of the international community, the regional community and the various states within Somalia are examined as to whether they have in anyway been able to prevent illegal fishing from occurring. The question is asked as to whether there is anyway the international community could have assisted Somalia to police its waters to prevent illegal fishing.

The waste dumped off Somalia's coast became known because of the 2004 Boxing Day tsunami. Chapter 4 examines in detail the international and regional hazardous waste regime and asks questions as to whether it is robust enough to carry out its function. This regime and the general principle to prevent environmental harm being caused to another state should have protected Somali waters from hazardous waste dumping. The chapter then goes on to look at the assignment of responsibility, liability, and compensation. It then tackles the question as to whether Somalia can obtain compensation for the damage caused by the waste dumping off its coast.

Piracy is the subject of Chapter 5 and in its wide-ranging discussion it briefly covers the law history of piracy in Africa. It asks the question as to what piracy actually is and if it should be criminalised and what empowers the response of the international and regional community. It asks the question as to why there appears to be different responses in the treatment of pirates and is there any liability for the destruction of fishing skiffs by the navy if the suspected pirates

are not charged. The question of extra judicial killing of pirates is raised and the different responses by the international community to these killings and the killings by pirates are questioned. Lastly, the chapter examines the use of Private security companies and the pitfalls to their use are exposed in the nature of human rights breaches and the lack of international agreements that offer protection to both the guards and those they are intervening against.

The thesis concludes by summing up the various questions and investigations and offers the conclusion that three major issues have contributed to the quagmire of international law that surrounds the situation in Somalia. The concept of the State, the issue of sovereignty and that while conservation aims are hortatory, breaches need to be seen as transnational criminal offences, like piracy, and supported by effective policing. This helps to explain why the response of the international community has differed so vastly between the four topic areas.

Chapter 2

State Failure

I am the Horn of Africa
Once a beautiful nation
Before the civil war
Before the invasion
(Helwaa)¹

2 Introduction

Threats to peace and security for the international community come from failed States. These threats have not diminished through action taken by the international community. They have occurred outside the mainstream of Western States in areas considered as of little possible consequence. Unrest in States such as Libya, Syria and the Ukraine continues to fuel the possibility of more state failure.

In the case of Somalia, previously the most widely recognised example of a failed State, recent political activity has seen, the creation of a new constitution, the initiation of processes towards a referendum on that constitution and steps towards stability being taken.²

The purpose of this chapter is to examine the concept of the failed State in relation to a functioning State and the legal consequences that flow from the use

¹ Cachia, above Chapter 1 n 1.

² M Harper "Somali Leaders Back New Constitution" *BBC News Africa* (London UK, 2012).

of the term, failed State. It will start by examining the ‘why’ of State failure particularly in Africa and distinguish between threats to peace and security and State failure.

2.1 Why State failure is prevalent in Africa

The failure of States in Africa seems to be a particular problem not experienced to the same extent in other regions of the world. While Asia has Cambodia and Central Asia, Afghanistan, the African continent has experienced failed States in the form of Chad, the Central African Republic, the Democratic Republic of Congo, (DRC), Somalia, South Sudan, Sudan, and Zimbabwe.³ Failure in Africa is the result of pre-colonial political organisations rendered irrelevant by both the colonisers, and those who would rise to replace them.⁴ State creation paid little heed to the indigenous nations’ political structures before laying down artificial borders. Once the United Nations General Assembly, (UNGA), had ratified the new boundaries and declared the new entities sovereign States there was no going back.⁵ At the time of the creation of the African States, little attention was paid to the possibility of the formation of an African concept of a political entity. African concepts would better suit the history, past political structures, and the vast array of different cultures that would function in Africa as well as the Westphalian model of statehood functioned in Europe.⁶ The creation of an alternative to the western model of statehood could be as threatening to existing African leaders as the actions of Eritrea in gaining independence from Ethiopia and the secession of South Sudan from Sudan.⁷

³ *Fragile States index* <http://fundforpeace.org/global/?q=fsi>, six of the top ten fragile States, the others being Afghanistan, Yemen Haiti and Pakistan.

⁴ Jeffrey Herbst “Responding to State Failure in Africa” 1996 21(3) *International Security* at pp121-122.

⁵ Herbst, above n 4 at p121.

⁶ At pp123, 125.

⁷ At p133, 137. The feared cascade of other peoples seeking self-determination has not occurred.

Pureza et al expand the contribution of the colonial system by stating that it was a system of taxation, extraction and domination of the people that left behind a bureaucracy that was poorly suited to govern.⁸ The bureaucracies created by the colonisers would take on the characteristics of sovereignty, as viewed from a western perspective, and deliver organised public goods, control over territory and provide an administrative presence throughout the country.⁹ The expectation was African States would accomplish in less than eighty years what had taken the Europeans centuries of State evolution to achieve.¹⁰ The changes wrought by the colonisers in creating clearly demarcated boundaries unsettled the existing political order and imposed the necessity of shifting allegiances from local leaders to a centralised and largely unknown authority.¹¹ The creation of borders that failed to recognise the diversity of the clan and tribal units led to the use of force, ostensibly by one tribe against another, in the battle for control of the mainly urban areas.¹²

The historical African concept of sovereignty differs from the western concept. The African concept of sovereignty focuses on people rather than on territory. The control the land and the control the people, under this concept, are shared.¹³ The 'new' concept of sovereignty brought by the colonisers required allegiance to the State.¹⁴ The failure by the international community to recognise the possibility of the existence of alternative political structures, not based on the Westphalian model, has led to the international community persisting in propping up States that have failed. The rush to create new nations all but ignored the existing arrangements for recognition of States and in so doing

⁸ Jose Pureza and others "Do States Fail or Are They Pushed? Lessons Learned From Three Former Portuguese Colonies" 2007 273 *Oficina do CES* at pp1-3, and Herbst, above n4 at p122.

⁹ Herbst, above n 4 at p 122.

¹⁰ Herbst, above n 4 at p130. Even the establishment of of the United States of America was not without its Civil War and War of Independence as was the same for the United Kingdom and its Civil War. The French also experienced their revolution as did Russia. The slowly maturing international community left these States to solve their own issues.

¹¹ Herbst, above n 4 at p 129.

¹² At pp130-131.

¹³ At pp128-129.

¹⁴ At p122.

showed the peril of disregarding how effective or stable States were.¹⁵ Both Hartmann and Giorgetti argue that this mismatch, between governing structure and the governed, is not a cause for State failure. States exhibit the same type of dysfunctional operational structure but are not in danger of failure.¹⁶ To avoid this continuing cycle of failure Herbst argues that the international community needs to recognise the historical concepts of African identity and be willing to integrate them into a system that has for too long been fixated on the Western model of a State.¹⁷

The next major influences on African States were the Cold War and the arrival of the neo-liberal counter-revolution. The Cold War brought funds and arms, and supported a system of patrimony that helped keep autocratic leaders in power.¹⁸ The over supply of arms enabled dissident groups to challenge newly instituted governments.¹⁹ The issues facing post-colonial second and third generation regimes were compounded by the collapse of the Cold War, which led to cutbacks on public spending, donor specialisation, reduction in subsidies for primary goods, and a diversion of aid funding to non bureaucratic corporate bodies.²⁰ At the same time as this counter revolution was occurring there was an increasing demand on developing States to comply with a neo-liberal programme that was beyond their ability and exceeded the demand made on developing States at any other time.²¹ Following the example of their colonists, the newly elected local leaders rampantly plundered the State coffers, Sese Seko of Zaire, Siaka Stevens of Sierra Leone and Siyaad Barre of Somalia to name a

¹⁵ Nil Lante Wallace-Bruce "Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law" 2000 47(1) NILR at p54.

¹⁶ Chiara Giorgetti *A Principled Approach to State Failure: International Community Actions in Emergency Situations* (Martinus Nijhoff, Leiden, 2010) at p46. William Zartman (ed) *Collapsed States: The Disintegration and Restoration of Legitimate Authority* (Lynne Reiner, Colorado, 1996) at p6.

¹⁷ Herbst, above n 4 at p p132-3.

¹⁸ At p124.

¹⁹ At p122.

²⁰ Pureza and others, above n 8 at p4.

²¹ Susan Woodward *Institutionally Fragile States. Fragile States, Prevention, and Post Conflict: Recommendations* (FRIDE Working Paper, Madrid, 2006) at p19 cited by Pureza and others, n 8 above at p4-5.

few.²² These new leaders were able to develop a highly tuned patrimonial system that survived as long as there was Cold War funding. The purpose of the funding was so the two major protagonists of the Cold War could purchase allies in the global struggle for the dominance of the most territory.²³

These conditions caused the weakest of African States to fail. The phenomenon of a failed State is not the direct result of the first generation post colonist governments; indeed Zartmann holds that it is more likely to be a second or third generation post-colonial regime that brings about the failure of a State. The international community stepped in and tried to recreate the Westphalian model without considering why the States had failed and what possible changes could be made to ensure there was no repeat.²⁴

2.2 Somalia and its colonisation

Before the coming of the Europeans to the African Continent Somalia did not exist. The area currently known, as Somalia was a collection of different tribes distributed unevenly throughout an area that covered parts of Kenya, Eritrea, Ethiopia, and Djibouti.²⁵ This demarcation of borders split between different States, leading to a sense of dislocation amongst the different tribes.²⁶

The British were the first colonisers, taking over an area now known as Somaliland from their base in Ethiopia. The thrust of the British was secondary to their colonisation of Kenya and Uganda, relying on what was known as the British Somaliland Protectorate as a source of meat.²⁷ The French managed to

²² Robert Rotberg "Failed States in a World of Terror" 2002 81 Foreign Affairs 127 at p 128.

²³ At p 128.

²⁴ Herbst, above n 4 at pp124-5.

²⁵ Said Samatar *Somalia: a Nation in Turmoil* (The Minority Rights Group, London, 1991) at p11.

²⁶ At p14.

²⁷ At p15.

acquire the area known today as Djibouti, as a way of controlling coffee from Ethiopia into the Mediterranean.

The Italians saw a possibility of developing a significant colony as a part of a resettlement programme from the Italian mainland and as a way of relieving pressure on an increasing population.²⁸ The Italians pushed the British out in the 1920s and then Britain returned to control the area during WWII. The United Nations (UN) returned some areas to Italian control post WWII and the remainder as a British protectorate. Independence was gained for both the British and Italian protectorates in 1960. The two former protectorates became unified within that same year.

The colonists were not interested in building up the strength of the people or culture; colonisation was about utilisation of the land for the benefit of the colonisers. The people and the land were secondary considerations.

Ethiopia was also interested in gaining direct access to the coast. However, it's efforts only succeeded in gaining control of the Haud pastureland and dividing the Ogaaden people between itself, Kenya and Somalia.²⁹ This has left some 3 million Somali people separated from their clansmen and geographic homeland.³⁰ The French relinquished control of Djibouti in 1977.

In 1969, as a result of a coup, Siyaad Barre took control of Somalia and remained in power until he was ousted in 1990. The resultant demise of a central government in Somalia led to a destructive civil war as many factions fought for

²⁸ At p31.

²⁹ Samatar, above n 25 at p15.

³⁰ At p15.

control of the spoils of national leadership. The state of internal strife, and the inability of one faction to gain ascendancy for any length of time, led to the nation being declared a failed State.

The UN, the African Union, (AU), and the United States, (US), have backed successive attempts at forming governments. The reach of these governments has failed to extend beyond some of the suburbs of Mogadishu, the capital of Somalia. The Islamic Courts Union, (ICU), had effective control over parts of southern Somalia during 2006. The ICU was forcefully removed after six months by the Ethiopian forces supported by the US. Two regions have been able to create some form of stability, Somaliland in the northwest, which has functioned independently since the mid 1990s, and Puntland in the north. Both of these areas are under effective tribal control.

While there has been this failure of government and fighting for control, Somalia has suffered from natural disasters as well. The fighting in the early 1990s disrupted the ability of rural people to grow sufficient food, which led to a significant famine. In 2004 there was a tsunami that decimated the coastline of Somalia destroying fishing vessels and villages.

To the international community's credit it has been willing to spend more than twenty years since the collapse of the Barre government engaging with Somalia, which has endured the ignominy of being the poster State of a collapsed State.³¹

This engagement has led to the recent establishment of a State constitution and the creation of a special assembly brought together by the elders, not those specifically seeking political appointment.³²

³¹ *Fragile States index*, above n 3, Somalia has moved to number 6 on the list, supplanted by South Sudan at the top of the list.

It has been suggested that the UN should adopt a trustee model to guide these failed African States to maturity as full and vibrant members of the international community.³³ Gordon would argue that this measure is nothing more than the re-institution of colonisation but under a different guise.³⁴ Considering the strength of opposition by Somalis displayed towards the last major peace keeping effort by the UN and specifically the US, it is doubtful that there would ever be national acceptance in Somalia of this idea.

The failure of African States can be seen as being contributed to through a number of factors both external and internal, including deep seated sociological issues, as well as historical, political, natural and geographical.³⁵

The term failed State, both describes the result of the process and implies that there is a set standard for successful States based on the Weberian State model.³⁶ The term is based on two assumptions, the lack of political and economic capacity to survive and secondly, that this is a result of poor internal governance.³⁷ The successful State is one in which the State supplies political goods for it's citizens and also enjoys protection from intervention by other international institutions or States.³⁸ The causes of State failure include geographical, physical, historical and political factors and in the case of Africa,

³² "Somali Assembly Endorses Draft Constitution" (2012)

<www.aljazeera.co/news/africa/2012/08/201281101033529886.html>

³³ Herbst, above n 4 at p125.

³⁴ Ruth Gordon "Saving Failed States: Sometimes a Neocolonialist Notion" 1997 12 Am.U.J.Int'l & Pol'y at p926.

³⁵ Teresa Andersson "State Responsibility During State Failure - A Question of Attribution and State Definition" (University of Lund, 2005) at p11.

³⁶ Pureza and others, above n 8 at pp1-3.

³⁷ Pureza and others, above n 8 at p2.

³⁸ Robert Jackson *Quasi States, Sovereignty, International Relations and the Third World* (Cambridge University Press, Cambridge, 1990) at p29 as cited by Pureza and others, above n 8 at p3. The principle of non-intervention.

errors by both colonial powers and the mistakes made by the Cold War protagonists.³⁹

Having briefly outlined the concept of a failed State and some of the possible causes, it is relevant to engage with the concept of a State to set the parameters of what a State is.

³⁹ Woodward, above n 21 cited by Pureza and others, above n 8 at p4-5.

3 The State

With the completion of the process of the Peace of Westphalia in 1648 the recognition of a secular international community was acknowledged.⁴⁰ The creation of this political entity finally gave rulers the ability to decide matters of internal governance of the people within a geographically defined area, without reference to the Holy Roman Empire.⁴¹ At the time this was occurring there developed two strains of thought, the recognition of the relationship between the people within a geographic area and those who had a right to rule, (social contract), and the idea that a geographic unit and the people within it could be viewed as an economic unit.⁴² To smooth relations between these newly created entities and to help them recognise others of their kind, a set of characteristics were developed.⁴³ These characteristics included a geographically defined area, a population, and some form of government.⁴⁴ Having established these characteristics, a set of rules were established that governed the interactions between these entities, that were agreed to by all the entities, to limit any possible abuse of power, both within the entity and between entities.⁴⁵ These rules did not initially include the Americas, Africa or Asia and were entirely Euro-centric as a consequence.⁴⁶ That there existed at the time other political entities of a non-European kind created difficulties for the European States entering into relations with these so called 'non-civilised' entities.⁴⁷ In order to become recognised by the European States a set of conditions were created that ensured non-European 'States' could be recognised. These conditions included the creation of governments, laws and administration modelled on the European

⁴⁰ Matthew Craven "Statehood, Self Determination and Recognition" in Malcolm Evans (ed) *International Law* (3rd ed, Oxford University Press, New York, 2010) at p210.

⁴¹ At p 210.

⁴² At p210.

⁴³ At p210.

⁴⁴ At p210.

⁴⁵ At p212.

⁴⁶ At p212 refers to the work of Martens and Kluber who referred to the rules as the Public Law of Europe.

⁴⁷ At p213.

examples.⁴⁸ These conditions were eventually laid down in Article 1 of the Montevideo Convention of 1933,⁴⁹ that for a State to have legal personality at international law it should possess; territory, a permanent population, a government and the capacity to enter relations with other States. Craven suggests that each of these is somewhat flawed and the convention omits some of the more important factors such as legitimacy, independence and self-determination.⁵⁰

While a State may possess the four characteristics of a State the last requirement prior to acceptance as a State is recognition by other States. Here the process is divided into two theories, either the declarative or the constitutive theory. The declarative theory posits that the action of a State in claiming that it is a State, in that it possesses the four criteria under the Montevideo Convention, is sufficient for statehood. This State then expects other States to regard it as such.⁵¹ The declarative theory requires the existence of the four criteria is determined before other States can begin relations with the State.⁵² The constitutive theory is the action of the recognising State establishing the legal existence of the other State through the formation of diplomatic relations or by entering into a treaty with the State and in doing so conferring status on that State as a State.⁵³ Once a State has been recognised under the constitutive process it is confirmation that the four criteria are present and the entity is a State. Crawford would claim that this moves the process of recognition from one of legitimacy to effectiveness.⁵⁴ Brownlie defines effectiveness as the actual and effective exercise of

⁴⁸ At p213.

⁴⁹ Montevideo Convention on the Rights and Duties of States, 26 December 1933. This is limited to the Americas. It has been seen as codification of customary international law.

⁵⁰ Craven, above n 40 at p220.

⁵¹ At p241.

⁵² At p210.

⁵³ At p259.

⁵⁴ James Crawford *The Creation of States in International Law* (Oxford University Press, New York, 2006) at p4.

jurisdiction.⁵⁵ Lauterpacht, cited by Rich, would further confuse the picture of recognition by claiming that it is an act of political policy and not one of law.⁵⁶ Cassese claims that the constitutive theory is fallacious in that it fails to take note of the effectiveness principle,⁵⁷ disregards the principle of the equality of States as it is requiring another State to grant legitimacy and that it flies in the face of logic in that some States could recognise the new State and others decline to recognise it giving the new State a split personality at law.⁵⁸

Kosovo is an example of a split personality State. The Kosovar Albanians were under a programme of repression and displacement by Yugoslavia.⁵⁹ The UN Security Council, (UNSC), under Resolution 1244, which authorised the creation of a military presence in Kosovo⁶⁰ and the installation of a civil presence to oversee the interim administration for Kosovo, United Nations Interim Administration Mission in Kosovo, (UNMIK), that would ‘provide transitional administration while establishing and overseeing the development of provisional self-governing institutions.’⁶¹

On the 17 February 2008 the leaders of the Kosovo Assembly declared independence.⁶² This act set of a spate of recognition by States that by 2010 had reached 62.⁶³ There were however, conditions attached to this recognition in that it was a unique and not a precedent setting act, as well as the fact that

⁵⁵ Ian Brownlie *Principles of Public International Law* (7th ed, Oxford University Press, New York, 2008) at p112.

⁵⁶ R Rich “Symposium: Recent Developments in the Practice of State Recognition, Recognition of States: The Collapse of Yugoslavia and the Soviet Union” 1993 4 E.J.I.L. 36 at p55.

⁵⁷ Charles de Visscher *Theory and Reality in International Law* (A Pedone, Paris, 1953) Chapter IV. The effectiveness principle is that which in law in general grants rights and obligations specifically, should be effective.

⁵⁸ Antonio Cassese *International Law* (2nd ed, Oxford University Press, Oxford, 2005) at p74.

⁵⁹ Christine Gray “The Use of Force and the International Legal Order” in Malcolm Evans (ed) *International Law* (3rd ed, Oxford University Press, New York, 2010) at p621.

⁶⁰ *United Nations Security Council Resolution SC Res 1244 S/RES/1244* (1999)

⁶¹ UNSCR, above n 60 at paragraph 10.

⁶² *Kosovo Declaration of Independence* (17 February 2008)

⁶³ Craven, above n 40 at p239.

independence was part of a proposal by the Special Representative, Matti Ahtissari that would lead to a political solution to the problem.⁶⁴ Russia, Serbia, Spain, and Greece all declined to recognise Kosovo. Russia utilised its veto in the SC to thwart any attempt by Kosovo to be made a member of the UN.⁶⁵ In reality it doesn't matter whether the theory applied is the either the constitutive or the declarative there is still uncertainty as to the status of Kosovo. Other aspects of Kosovo's statehood will be discussed below.

While there is still uncertainty and the lack of a clear definition of a State a closer examination of the four criteria may provide some clarity.⁶⁶

3.1.1 Territory

States are political entities that are established within defined territorial boundaries. These boundaries at the time of recognition may not be either contiguous or clearly delimited or of some predetermined size.⁶⁷ When States fail their borders are not called in to question.⁶⁸ Modern States come into being in one of two ways, either through international agents, States or organisations, allowing non-State entities to gain legitimate statehood or through the action of entities with similar characteristics following each other in gaining statehood. Decolonisation of Africa and the break up of the former Balkan and USSR States are examples of this in action.⁶⁹ The problem for Kosovo is that it formed part of Serbia and would need to be seceded from that State. This would be in breach of

⁶⁴ At p210.

⁶⁵ Malcolm Shaw *International Law* (6th ed, Cambridge University Press, Cambridge, 2008) at p453.

⁶⁶ Crawford, above n 54 at p37.

⁶⁷ At p46. Crawford identifies Israel as a State that lacked clear boundaries when it was formed.

⁶⁸ Daniel Thürer "The "Failed State" and International Law" 1999 836 *International Red Cross Review* at p12.

⁶⁹ Alexander Cooley "Kosovo's Precedents: The Politics of Sovereign Emergence and its alternatives" 2008 Policy Memo 7 PONARS Eurasia 1 at p2 and at p3 identifies the break up of the former USSR and Yugoslavia as two other examples in the 1990s, both of which have caused some concerns for Western European States as they were more correctly federations of autonomous States.

the principle of *uti posseditis*, which has been confirmed as customary international law, (CIL), by the Yugoslavia Arbitration Commission, which held that,

‘...whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti posseditis*) except where the States concerned agree otherwise.’⁷⁰

The advisory opinion of 22 July 2010 Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo avoided commenting on the creation of a State and the opinion at paragraph 83 dealt briefly with the secession as it felt that it was beyond the scope of the question asked by the General Assembly, (GA), of the UN.⁷¹ In the instance of Somaliland and its secession from Somalia as a failed State, British Somaliland was accorded recognition, if only for four days, prior to it becoming a part of the Republic of Somalia, so has its borders acknowledged at an international level as it was recognised by the US, amongst others as a State.⁷²

⁷⁰ *Yugoslavia Peace Conference, arbitration Commission, Opinions, 2 (Right to self determination of Serbs in Croatia and Bosnia Herzegovina)* 92 ILR 167 at p168.

⁷¹ Accordance of International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion) I.C.J. Reports p40; at paragraph 83. The claim to territory by Kosovo breaches the principle of *uti posseditis juris*, in that it creates a change to the boundaries of an existing State, which in this case was Serbia.

⁷² Crawford, above n 54 at p90.

3.1.2 Population

Not a contentious issue. There is a wide variation in the sizes of population of States ranging from a few hundred, Vatican City through to billions in China.⁷³ In the context of the failed State, even though there might be fluctuations in size due to refugees leaving the territory, there is no affect on the status of a State. Once statehood has been recognised in a political entity changes to the population do not alter the status of the State.⁷⁴ At the time of Kosovo's independence declaration it had a population of approximately 1.9 million people.

3.1.3 Government

This criterion is slightly more contentious than the other two. More than just government is required; it needs to be effective government.⁷⁵ There is a fair degree of flexibility in the application of this criterion, as some governments have been in doubt as to their ability to control a territory beyond the urban area. The example of the Democratic Republic of the Congo is an example where two factions were fighting for control shortly after the grant of independence.⁷⁶ The flexibility with which the requirement to have an effective government is applied relates to the standing of the State concerned. New States have this requirement applied more rigorously than States bordering on extinction.⁷⁷ This criterion is subject to value judgments as to the extent of control the government has over a population, territory and the maintenance of law and order.⁷⁸ A government needs to be effective, however, there is a suggestion that for new States, it needs to be a democratic government. The European Community's,

⁷³ At p52.

⁷⁴ Giorgetti, above n 16 at p55.

⁷⁵ Crawford, above n 54 at p56.

⁷⁶ Crawford, above n 54 at p56.

⁷⁷ At p59

⁷⁸ At p56.

(EC), guidelines,⁷⁹ for the recognition of new States from the Socialist Federal Republic of Yugoslavia, (SFRY), laid down democratic government as a condition for recognition.⁸⁰ The condition in no way detracts from those existing States who have chosen a different form of government. The UN controlled Kosovo at the time of its independence but was independent of Serbia. It did not have an independent, effective, government.

3.1.4 Entering into international relations

The last criterion, entering into international relations appears to be the conflation of two conditions,⁸¹ independence and effective government without which a State cannot enter into relationships with other States. Kosovo having declared itself independent would be able to enter into relations with other States. This would however be limited to the States that have recognised it and therefore not an all-encompassing right.

The codification of the criteria for statehood has been consistent if not consistently applied.⁸² With the break up of the USSR and the SFRY some confusion has been created. The EC guidelines mentioned above created in effect a new set of pre-conditions for state recognition.⁸³ The new conditions include; recognition of the self determination of peoples, democratic government only acceptable, respect for human rights and minorities, nuclear disarmament and nuclear non-proliferation, and the requirement that States wishing to join the EC from the SFRY had to state their desire to be recognised by a specific date.⁸⁴ The

⁷⁹ D Turk "Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (16 December 1991) " 1993 4(1) E.J.I.L.

⁸⁰ Turk, above n 79. In both the preamble and Annex 1 it is made clear that a pre-condition for recognition is a democratic government as being the only acceptable form of government.

⁸¹ Crawford, above n 54 at p62.

⁸² Cedric Ryngaert and Sven Sobrie "Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia and Abkhazia" 2011 24 L.J.I.L 467 at p477.

⁸³ See Annex 1

⁸⁴ See Annex 2

focus on the democratic form of government, while not breaching the UN Charter in relation to non-interference, as the entities were not yet States, presupposes that there is only one form of effective government as opposed to the acceptance of various forms following decolonisation.⁸⁵ While these preconditions, applied only to the SFRY and USSR, it is not inconceivable that they could be applied to other States seeking recognition. It would take a majority of States that form part of the UN to utilise these new conditions for them to be accepted as CIL. The purpose behind establishing the original Montevideo criteria was for the establishment of some consistency and as a defence against what could be doubtful claims of statehood.⁸⁶ It is important to recognise the difference between Montevideo criteria, which need to exist before a State can be called a State, and the act of recognition of an entity that possesses those criteria, as a State. The result of the break up of these two former federal republics is that the consistency once aimed for has become less predictable, less legal and more political.⁸⁷ It has been suggested that the balance between politics and law has been upset.⁸⁸ The move away from the four accepted criteria while not signalling their end is a move towards value judgments and away from consistency, from legal recognition, to political recognition.⁸⁹

The concept of recognition was further confused when three of the States of the former USSR, Latvia, Lithuania and Estonia were not so much recognised, as their former status as sovereign States was acknowledged by the US and by the EC.⁹⁰ The break up of the former SFRY led to Croatia and Slovenia declaring independence and inviting other States to form diplomatic relations with them.⁹¹ The Ukraine followed a different path by holding a referendum where a 90% majority voted for a Declaration of Independence. Following the declaration

⁸⁵ Ryngaert and Sobrie, above n 82 at p475.

⁸⁶ Rich, above n 56 at p55.

⁸⁷ Ryngaert and Sobrie, above n 82 at p477 and Rich, above n 56 at p63.

⁸⁸ Rich, above n 56 at p56.

⁸⁹ At p39.

⁹⁰ Rich, above n 56 at p37-8

⁹¹ At p39.

Canada immediately recognised the new State.⁹² As a condition of recognition there was a requirement to abide by nuclear non-proliferation by the securing of existing nuclear arms and a requirement to follow other treaties relating to arms control.⁹³ Georgia provided another level of complexity for the international community as the former USSR broke up and some of the previous republics became members of the Commonwealth of Independent States, (CIS). Georgia at the time was undergoing internal turmoil and was not able to meet the criterion under the Montevideo Convention. This did not stop the US from recognising Georgia as a new State. Two questions are raised by this process; 1) When a State is recognised by a single State is it a State? 2) When a State is recognised with attendant conditions and fails to adhere to those conditions post recognition is it still a State? The answer to these questions is beyond the scope of this thesis.

⁹² At p41.

⁹³ At p 41. Although the Montevideo Convention Art 6 would suggest that additional conditions to state recognition are not legally binding.

4 Legal consequences of the grant of Statehood

There are five principles that are accepted as the legal consequences that flow from statehood; external personality; internal affairs of State are inviolable; not subject to international process or jurisdiction without consent; that entities described as States are equal; derogations from these principles are not accepted.⁹⁴

The equality of States is an area that while legally correct, is politically a fiction.⁹⁵ Equality is differentiated when States ratify conventions or treaties that assign certain voting rights to some members or the weight that a member State's vote carries is greater than other States.⁹⁶ While all States might be legal equals their influence and voice within international relations varies considerably.

Having been recognised by the international community as being a State it is necessary to understand the legal consequences that follow recognition. High on the list is the fact of acceptance that the sovereignty is recognised and the State is now able to join, without issue, the international community.⁹⁷ Sovereignty implies that a State has legislative, judicial and executive authority over its territory as well as its choice of political, economic, social and cultural systems.⁹⁸ A State is limited only by the international obligations taken on by treaties it is a

⁹⁴ Crawford, above n 54 at p41. Where doubt exists courts or international tribunals lean towards deciding in the favour of the freedom of States to act.

⁹⁵ Charter of the United Nations Art 2(1) specifies that all members are sovereign equals. This notion of equality of States is more formal than a moral principle as States acknowledge when they sign the Charter that there are permanent members of the Security Council under Art 23(1) and that other States only attain membership on a two year basis.

⁹⁶ Brownlie, above n 55 at pp289-298. The international Monetary Fund and the UN are two examples cited. States consent to these differences when they sign the treaty.

⁹⁷ Wallace-Bruce, above n 15 at p55.

⁹⁸ Shaw, above n 65 at p1148. The United Nations Charter Art 2(7) holds that the UN does not have the right to intervene in the matters that are essentially under the domestic jurisdiction of a State.

signatory to, and by international obligations in the form of the principle of non-interference in the affairs of other States and by custom.⁹⁹ This view of sovereignty is today under threat as international law surrounding human rights are being used as an avenue of interference in domestic affairs.¹⁰⁰ The actions of many transnational organisations also extend across borders, particularly in the area of telecommunications and banking or finance.¹⁰¹ These organisations, institutions and treaties limit the control a State has over its internal affairs by holding the State to conform to externally imposed conditions.¹⁰²

The articles of the Vienna Convention on the Law of Treaties, Art 6 states, “Every State possess capacity to conclude treaties.”¹⁰³ This creates for the State that ratifies the treaty a series of both rights and obligations that have legal force. The CIL principle of *pacta sunt servanda* holds that agreements are binding.

States also have the ability to join international organisations. The UN Charter Art 3 recognises the right of States who were the original participants to the United Nations Conference on International Organisation to be known as original members.¹⁰⁴ Art 4 creates the right of membership for other States willing to accept the obligations of the Charter.¹⁰⁵

⁹⁹ At p1147.

¹⁰⁰ Shaw, above n 65 at p648.

¹⁰¹ Wallace-Bruce, above n 15 at p55.

¹⁰² Shaw, above n 65 at p260. States are not the only holders of legal personality; it has long been acknowledged that both organisations and individuals have legal personality at international law. The right of an institution to legal personality is determined by a number of factors including but not exclusively, its constitutional status and its powers and practice. This practice is further refined by the institutions ability to sign treaties or enter into relations with States or other institutions.

¹⁰³ Vienna Convention on the Law of Treaties UNTS vol. 1155, p 331 (opened for signature 23 May 1969, entered into force 27 January 1980)

¹⁰⁴ UN Charter Art 3.

¹⁰⁵ UN Charter Art 4.

A State becomes responsible for its actions as a result of joining treaties and at CIL. If there is a breach of a treaty the State can be held responsible for that act.¹⁰⁶ In the *Spanish Zone of Morocco Claims* it was held that, ' Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility.'¹⁰⁷

The creation of the Responsibility of States for Internationally Wrongful Acts,¹⁰⁸ (Responsibility of States), is a guideline for States as to the limits of their responsibility and was adopted by the UN in 2002.¹⁰⁹ Chapter 1 of the Responsibility of States assigns responsibility for the act to the State and defines what a wrongful act of a State is. The draft of the Responsibility of States has been recognised by the international Court of Justice in the *Gabčíkovo-Nagymoros Project* where the court recognised the attribution of State responsibility for failing to respect obligations under treaty.¹¹⁰

As mentioned above States are bound by the UN Charter Art 7 and by the CIL principle of non-intervention in the domestic affairs of other States.

¹⁰⁶ Brownlie, above n 55 at p434.

¹⁰⁷ *Spanish Zone of Morocco Claims (Great Britain v. Spain)* (1924) 2 R.I.A.A 615 at p641, cited by Brownlie, above n 55 at p435.

¹⁰⁸ Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty third Session, UN GAOR, 56 Sess, Supp No 10 UN Doc A/56/10 Y.I.L.C., (2001), vol.II (Part two) A/56/49(Vol. I)/Corr.4.

¹⁰⁹ Resolution adopted by the General Assembly GA Res 56/83, A/RES/56/83 2002 The draft articles were commended to governments at paragraph 3. There is some preambular comment regarding the importance of the articles and the possibility of the creation of a convention but this has not as yet transpired.

¹¹⁰ *Gabčíkovo-Nagymoros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 at p38 paragraph 47.

5 The failed State- definitions, terms, examples

There are numerous political definitions of a failed State that indicate some form of legal consequences, there is however, no single legal definition.¹¹¹ The Fragile States index uses twelve indices to determine what constitutes a fragile or failed State however; it does not specify the legal consequences of such a determination.¹¹²

The term 'failed States' was first used in 1992.¹¹³ Koskenmaki claims that the phenomenon defies definition due to the complex nature of the process of failure. He is certain is that it places the State institution in doubt.¹¹⁴ Others have asserted that there lack of a clear definition as the different terms used imply different meanings to different users.¹¹⁵ The consequent use of the term has given rise to various degrees of failure to describe the descent of a State from an implied condition of success to weak, failing, failed and collapsed States. The three major factors of economic, political and social upheaval are not in doubt when referring to a failed State. What is in doubt is the extent of upheaval required before a State is declared as 'failed' and the legal consequences that are attached to the term.¹¹⁶ There may be reasons as to why there is no clear definition of a failed State. A clear definition might limit the methods of response available to the international community or it is possible that the term itself raises too many challenges to be quantifiably defined in a meaningful way. There

¹¹¹ Rotberg, above n 22 at p129. Donald Potter "State Responsibility, Sovereignty and Failed States" (paper presented to Australian Political Studies Association Conference, Adelaide, 29 September - 1 October 2004) 16 at p3.

¹¹² Fragile States index, above n 3. The Fragile States index was created as a collaboration between Foreign Policy and the Fund for Peace. It is annually updated and based on social economic, and political factors.

¹¹³ Gerald Helman and Steven Ratner "Saving Failed States" 1992-1993 89 Foreign Policy at p3.

¹¹⁴ Rikkai Koskenmaki "Legal Implications From State Failure in Light of the Case of Somalia" 2004 73 Nord. J. Int'l L 1 at p2.

¹¹⁵ Wallace-Bruce, above n 15 at p58.

¹¹⁶ Koskenmaki, above n 114 at p5.

is a definite lack of supply of public goods to the citizens of a failed State.¹¹⁷ Public goods are described as the provision of national and individual security and public order; inviolable contracts, independent judiciary; provision, organisation and regulation of logistical and communication infrastructure; medical care; education and social services; regulation and supply of water and energy and environmental protection. The supply of public goods is the main reason that governments exist.¹¹⁸ Certainly there is a reduction in the ability of the government to govern effectively and there is also a consequent loss of government institutions.¹¹⁹ Any attempt at a legal definition must be quite narrow and must encapsulate this loss of effective government.¹²⁰ It has been suggested that the loss of effective government may disqualify a State from existence as a legally identifiable entity.¹²¹

Currently the only legally acceptable way of a State losing its existence is through the process of dissolution or extinction, both of which require the former State to be either integrated in to a single new State or dissolved into two new entities that take over the boundaries of the previously existing State.¹²² Having briefly outlined the confusing situation regarding the status of a failed State and the consequences alluded to, it will be beneficial to further examine the terms that cover the field of State failure to determine just what a failed State may or may not be.

Weak States have been described as States in which there is a current challenge to the control of the existing government, there are low levels of public order, the borders are not secure and there is an inability to maintain the delivery of public

¹¹⁷ Rotberg, above n 22 at p131.

¹¹⁸ Rotberg, above n 22 at p 131. It must be noted that these are distinctly western public goods and may not be viewed in the same light by constituents of African or Asian States.

¹¹⁹ Wallace-Bruce, above n 15 at p58.

¹²⁰ Koskenmaki, above n 114 at p2.

¹²¹ At p6.

¹²² Shaw, above n 65 at pp960-965. The amalgamation of the Federal Republic of Germany and the German Democratic Republic as an instance of the one, amalgamation, and the SFRY as an instance where a State failed to exist as it dissolved into a number of other States, Bosnia, Croatia and Slovenia and a new SFRY admitted to the UN in 2000.

goods.¹²³ While these States are teetering on the brink of failure, not all descend into failure, some stay weakened and others manage to recover.¹²⁴ Examples of the first are Chad, Kyrgyzstan and Russia, and Colombia, Sri Lanka and Zimbabwe are examples of the second.

While the term failing State has been used, there is no clear definition or attempt to describe what constitutes a failing State. This term has been applied to States that are either in the process of failing or to States that are at risk of failing.¹²⁵ This term is unable to take account of States that may be failing in one area or in several but not at risk of total failure.¹²⁶ As is discussed below the descriptor of a State without effective government clearly stipulates the condition of the State and makes links back to the four criterion under the Montevideo Convention that guide State creation.

Should a failed State be unable to halt its decline, it is assumed that the next step is to descend into the ultimate of State of failure, a collapsed State. A collapsed State occurs when structures of legitimate power, law and political order fall apart. What is left is a State unable to provide itself with basic public goods.¹²⁷ These goods are supplied instead by ad hoc means.¹²⁸ States are viewed as a

¹²³ Edward Newman "Weak States, State Failure and Terrorism" 2007 19 *Terrorism and Political Violence* at p422. Supported by Dominic Lisanti "Do Failed States Really Breed Terrorists?: An Examination of Terrorism in Sub-Saharan Africa Comparing Statistical Approaches with A Fuzzy Set Qualitative Comparative Analysis" (Paper presented to CAPERS, New York University, 14 May 2010 2010) at p21. Bridget Coggins "Does State Failure Cause Terrorism? An Empirical Analysis (1999-2008)" 2014 *J. Conflict Resol* at p24. This article also relies on quantitative analysis and indicates the same result as Lisanti, failed States do not necessarily harbour or cause terrorism unless there are multiple interceding factors.

¹²⁴ Rotberg, above n 22 at p131.

¹²⁵ James Putzel and Jonathan Di John *Meeting the Challenges of Crisis States* (London School of Economics and Political Science, London, 2012) at p6 Chapter 2 describe Malawi, Tanzania and Zambia as examples of this type of State.

¹²⁶ Putzel and Di John, above n 125 at p6.

¹²⁷ Terence Lyons and Ahmed Samatar *Somalia: State Collapse, Multilateral Intervention and Strategies for Political Reconstruction Occasional Papers* (Brookings Institute, Washington D.C, 1995) at p1.

¹²⁸ Andersson, above n 35 at p10.

threat to peace and security as they are seen as a breeding ground for disease, refugee flows, arms trafficking, transnational crime, environmental destruction and regional instability.¹²⁹ Collapsed States are alleged to be a sanctuary and training facility for terrorists.¹³⁰ Lack of effective government, as has been stated above, has been suggested as disqualifying a State from legal existence.¹³¹ But lack of effective government is not one of the currently accepted methods for extinction of a State. This would raise innumerable questions as to what an effective government is and would by necessity require an international organisation to oversee the ineffective governments and to advise and adjudicate with States who challenge their classification. It has been suggested that collapsed States are rare and very extreme versions of a failed State in which there is total absence of any authority.¹³² If this is the case then by this measure alone Somalia is not a collapsed State as it has two autonomous regions, Somaliland and Puntland, where regional governmental control exists. Even at the very worst of times over the past 23 years there has always existed some form of government in Somalia, that its reach and ability have been severely limited is certainly not grounds for the legal extinction of the State. There have been no attempts to take over the existing boundaries by any group; the internal civil war has focused on the control of the existing area. Although, as has been previously discussed, Somaliland had its borders recognised. Certainly there has been limited effective government control of Somalia, there has been internal civil conflict and the provision of public goods by the government has ceased, but all of these have taken place within a relatively limited area in the southern region of Somalia. Semi effective government has continued in both Somaliland and Puntland. It would therefore be erroneous to classify Somalia as a failed State or even a collapsed State. Its borders are still intact, it still has a population, it has pockets of effective government, and the government that has been created through UN efforts has not seemed intent on establishing international relations.

¹²⁹ Kenneth Menkhaus *Somalia: State Collapse and the Threat of Terrorism* (Oxford University Press, New York, 2004) at p7.

¹³⁰ John Yoo "Fixing Failed States" 2011 99 CLR 95 at pp103, 108. Yoo only provides the example of Afghanistan and the freedom that Al Qaeda had to operate.

¹³¹ Koskenmaki, above n 114 at p6.

¹³² Rotberg, above n 22 at p133.

That the UN is working with successive iterations of central government would suggest that Somalia is still recognised as a State regardless of the disruption to its internal functioning.

While the above descriptors of a failed, failing and collapsed State help to identify a failed State, none of the writers continue on to describe the consequences, either political or legal, for a failed State. The legal consequences will be addressed in a deeper discussion below. The two major stumbling blocks to any concerted activity by the international community are found in Art 2(7) of the UN Charter and the strong hold that States created after WWII, following decolonisation, have for the concept of sovereignty.¹³³

¹³³ Ryngaert and Sobrie, above n 82 at p9.

6 What has actually failed?

The preceding discussion has identified the main features of a failed State are the inability of the government to provide public goods, the deterioration of the basic government institutions and challenges to the remnants of government. The State borders, while still intact, have become slightly more porous as the failure of government institutions tasked with keeping them secure have all but evaporated.¹³⁴ If we analyse the situation we find that all that has really failed is the government. Of the three other Montevideo criteria two are still functioning, borders and population and the third, the ability to for international relations is affected through the lack of effective government. There could be an argument, that the UN has worked with various iterations of Somali government, which would tend to suggest that the government has not failed and that those institutions representing Somalia, the Transitional Federal Government, (TFG) or the Transitional National Government, (TNG), could indeed form international relations. By careful analysis then we find that even though the label, failed State has been applied, all four criteria under the Montevideo Convention are able to function. From a legal perspective then the State still exists. What is lacking is the effectiveness of those governments mentioned above, to take any form of control over more than a few suburbs of the capital city. This has not stopped the UN from consistently supporting the continued statehood and sovereignty of Somalia in its resolutions on the situation in Somalia.¹³⁵ This would support the argument that those governments could negotiate international treaties or form international relationships. The recognition of a State through the avenue of effective government raises then the spectre of governmental recognition as opposed to State recognition. Crawford argues that an effective central government keeps the legal status of a political entity as a State and that lack of

¹³⁴ W Brooks *Why Failed States Matter: The Case of Somalia* (United States Army War College, Carlisle, United States) at p15

¹³⁵ *United Nations Security Council Resolution SC Res. 1474, S/RES/1474(2003)* preamble. This is the first UNSCR that recognises the sovereignty, territorial integrity, political independence and unity of Somalia some 12 years after the collapse of the Barre government.

effective government indicates that the entity may not be a State.¹³⁶ There is no legal basis for this argument apart from the inclusion of effective government as a criterion for State creation. But the practice of States would indicate that even this is doubtful.¹³⁷

Basing the concept of a failed State on the lack of effective government would seem to be a flawed argument lacking in any legal support in CIL. The term, failed State, is little more than a political descriptor that lacks any legal basis. Basing the description of a failed State on the lack of effective government is also flawed, as lack of effective government does not affect the legitimacy of the State.

¹³⁶ Crawford, above n 54 at p60.

¹³⁷ The cases of Georgia and the DRG mentioned above are but two examples of where States have not had effective government at the time of creation,

6.1 The concept of a 'failed State' as distinct from situations giving rise to threats to peace and security

Failed States have been branded as threats to international peace and security. The UN, in its first resolution on the crisis in Somalia, stipulated there was a threat and quoted the humanitarian crisis as the basis of that threat, yet failed to clarify how this threat would manifest itself or who indeed would be affected.¹³⁸ The determination that a situation is a threat to international peace and security allows the UN to act militarily and apply sanctions to States under Chapter VII Article 39, which gives the right to the UN to determine either a 'threat to the peace or a breach of the peace' and to make recommendations or decide what measures are to be taken under Art 41, (sanctions), or Art 42, (military action).¹³⁹ The actual threat is not defined to allow maximum flexibility to the Security Council, (SC) and General Assembly, (GA), when making determinations under this heading.¹⁴⁰ In their early format threats to peace were focused around interstate conflict. Since the end of the Cold War the flexibility of the SC in making their determinations has expanded to include humanitarian emergencies, overthrow of democratically elected leaders, extreme repression of civilian populations and refugees flows threatening regional security.¹⁴¹

The ability to respond more flexibly has allowed for expansion to cover nuclear proliferation, arms trafficking weapons of mass destruction, pandemics, climate change and what must be the ultimate extension of a threat to peace, the

¹³⁸ *Items relating to the situation in Somalia SC Res. 733, S/RES/733(1992)* cited by Neyire Akpinarli *The Fragility of the "failed State" Paradigm* (Martinus Nijhoff, Leiden, 2012) at p 39.

¹³⁹ UN Charter articles 39, 40 and 41.

¹⁴⁰ *Max Planck Encyclopedia, Peace, threats to*, 2009) §4.

¹⁴¹ At §7.

determination that ‘terrorism’, which at its very essence is no more than a concept, is a threat to international peace.¹⁴²

When we consider the threats listed above it becomes apparent that the threats exist, not in the fact of a failed State,¹⁴³ but rather as a consequence of loss of effective government. Zartman maintains that not all failed States exhibit the same problems and not all pose a threat to peace and security.¹⁴⁴ By making a quick comparison between Afghanistan and Somalia it is possible to see that one was taken over by a religious group that sought to bring control to an entire country, while the other lacked any form of government or control. The major threat to peace and security posed to the international community by Afghanistan was from the expansion of the terrorist group Al Qaeda. While Somalia had a non-terrorist faction, the ICU, instil some form of government in the southern part it did not spread to the wider regions. Chomsky on the other hand has applied the features that express the term, failed State to the United States to show how the term is of little value.¹⁴⁵ The most commonly used ground for a failed State to constitute a threat to peace is that it will be used to harbour terrorists.¹⁴⁶ This threat was used as the basis for the US backed Ethiopian invasion of southern Somalia in 2006 when the government of the ICU was ousted from Mogadishu.¹⁴⁷ However, as has been shown above failed States do not of their own accord harbour terrorists, those that do are more the exception than the rule.

¹⁴² At §12 where UNSCR 1373 (2001) is cited suggesting that the move has been made from concrete acts to the future possibility of a terrorist act.

¹⁴³ H Tuerk “The Resurgence of Piracy: A Phenomenon of Modern Times” (2009) UN Audiovisual Library of International Law <www.legal.un.org/avl/lis/Tuerk_LOS.html>

¹⁴⁴ Zartman, above n 16 at p7.

¹⁴⁵ Noam Chomsky *The Abuse of Power and the Assault on Democracy* (Henry Holt, New York, 2007).

¹⁴⁶ Menkhaus, above n 129 at p9. R Baker “Challenges to the Traditional Concepts of Sovereignty” 2000 20 Public Administrative Development at p8. M Silva “Somalia: State Failure, Piracy, and the Challenge to International Law” 2009-2010 50 Va. J.Int’l L. 553 at p556.

¹⁴⁷ Menkhaus, above n 129 at p74.

7 Legal consequences of being a failed State

While the subject of State failure has generated vast quantities of academic thought and writing, the very narrow field of inquiry into the legal consequences flowing from the declaration of a State as a failed State appears to be under researched.¹⁴⁸ This could be because the focus of international law, as far as States are concerned, is with their creation and extinction, not their ongoing health and welfare.¹⁴⁹ This could be attributable to the fact that the more influential States have overlooked the history of their own rise to a place of influence that has included civil war and revolution.¹⁵⁰ This lack of preparedness for the possibility that other States may experience ‘growing pains’ on the journey to full maturity has created problems for the international legal order that are both complex and challenging.¹⁵¹ International law has only envisaged the extinction of a State as the singular method by which a State loses its legal personality.¹⁵² That a State could possibly exist without a government has not been contemplated.¹⁵³ It could be that international law has been too slow to adapt to what has become a significant phenomenon of the last 20 years and as yet has not had time to develop the principles and processes to effectively respond to a State with ineffective government.¹⁵⁴ If it is accepted that a State has an ineffective government, does this put the State outside international law,¹⁵⁵ has it lost the capacity to act as a subject of international law or has it retained

¹⁴⁸ Giorgetti, above n 16 at p43.

¹⁴⁹ Koskenmaki, above n 114 at p2.

¹⁵⁰ The US (War of Independence 1775-1783), (Civil War 1861-1865) and both the UK and France, which, after becoming States experienced internal strife and revolution. (England 1642-1651 and France 1789-1799).

¹⁵¹ Andersson, above n 35 at p10.

¹⁵² Wallace-Bruce, above n 15 at p66.

¹⁵³ Koskenmaki, above n 114 at p1.

¹⁵⁴ Wallace-Bruce, above n 15 at p54.

¹⁵⁵ Koskenmaki, above n 114 at p1.

that legal capacity and just lost the ability to exercise it;¹⁵⁶ and do the rules of international law apply or are there some new ways of dealing with an outlier of a State?¹⁵⁷

These are some of the questions surrounding the legal consequences for States without effective government. This section will briefly look at the way international law has been applied across a range of circumstances in an attempt to discern how States have been affected by the use of the term, failed State.

There is an assumption of effectiveness combined with the principle of continuity that protects a State from extinction.¹⁵⁸ There is also protection from intervention in domestic affairs by other States under the UN Charter Art 2(7). When internal affairs develop an international character through refugees exiting the country or the development of a massive humanitarian crisis,¹⁵⁹ then there is room under Chapter VII of the UN Charter to intervene as discussed above. This has however, not stopped the action by Ethiopia and the US acting without UN sanction and overthrowing the ICU in Mogadishu. Thürer maintains that currently the UN finds itself drawn between two possible principles, the sovereignty and equality of States and the right to self-determination.¹⁶⁰ He suggests the UN has opted for the right of self-determination, albeit supported by UN intervention, to avoid humanitarian crises and rebuild the State without effective government.¹⁶¹ A failed State is viewed as a threat to the international system as a whole. A State with ineffective government should be protected from outside forces by the prohibition on the use of force¹⁶² and by the desire of the UN

¹⁵⁶ Thürer, above n 68 at p3.

¹⁵⁷ Koskenmaki, above n 114 at p4.

¹⁵⁸ At p16.

¹⁵⁹ Wallace-Bruce, above n 15 at pp57-8.

¹⁶⁰ Thürer, above n 68 at p4.

¹⁶¹ At p4.

¹⁶² UN Charter Chapter 1 Art 2(4).

to maintain international peace and security and to avoid breaches of the peace by resolving issues, which might lead to breaches of the peace.¹⁶³

While the UN has declared that Somalia has suffered from a total loss of government,¹⁶⁴ it has gone on to assert that the sovereignty, territorial integrity, political independence and unity are still intact.¹⁶⁵ This could be seen as an advisory to Somaliland and Puntland that the UN would not support any action for secession initiated by these two regions. The UN has used Chapter VII in Somalia to breach its sovereignty, to address the problem of piracy, however, there is a codicil that requires consent of the Somalia government to forces cooperating with the government, to allow them to encroach on that sovereignty.¹⁶⁶ This action is taken to avoid the member States taking unilateral action and breaching the sovereignty of Somalia. The action by the UN is based on four grounds; 1) Gross breaches of human rights or infringements of internal democracy are threats to peace and security; 2) Under Chapter VII Art. 39 to restore peace by military means if necessary; 3) Securing internal peace extends to the holding by military force, airports, ports, transport facilities and infrastructure to enable humanitarian aid to be distributed; 4) The parties to the conflict are to be addressed as if they were inter-State parties.¹⁶⁷

¹⁶³ UN Charter Chapter 1 Art 1(1).

¹⁶⁴ *Letter of the Secretary-General to the Security Council, UN Doc. S/24868 30 November 1992* (1992) at paragraph 6 and *United Nations Security Council Resolution SC Res 897, S/RES/897* (1994) preamble.

¹⁶⁵ *United Nations Security Council Resolution SC Res. 1474, S/RES/1474(2003)*, above n 135

¹⁶⁶ *United Nations Security Council Resolution SC Res.1816, S/RES/1816 (2008)* in the preamble states '...adopted unanimously with Somalia's consent.' *United Nations Security Council Resolution SC Res.1851, S/RES/1851 (2008)* authorises member states to cooperate with the TFG...for which advanced notification has been provided...may undertake all necessary measures...'. Sec Res 1851 limited the possibility of this action for 12 months but there have been several extensions to that initial period, UNSCR 1897, UNSCR 1950, UNSCR 2020, UNSCR 2077, UNSCR 2125

¹⁶⁷ Thürer, above n 68 at pp5-6.

Government to government relations cease yet formal State diplomatic relations continue, although how this is achieved is not explained by Koskenmaki if the representative of the State, the government, ceases to be effective.¹⁶⁸

Problems for nationals of a failed State arise when they attempt to either leave their own country or having left seek to revalidate their visas as the representatives of their home State lack validity with the receiving State and for those wishing to leave their home country find that diplomatic missions have been withdrawn due to the danger posed by the internal upheaval.¹⁶⁹ The diplomats of the State who have been working in the overseas missions also face their own problems,¹⁷⁰ as there is no one authorised to pay them and pay for the upkeep of the mission and its facilities, and there is no authorised body to issue a notice of recall.¹⁷¹ The receiving State can seek to have them recalled, however, there is no effective government to issue the notice of recall. Since the August 2012 elections in Somalia embassies have been established in Europe, Asia and the US all manned by Ambassadors.¹⁷²

The issue of UN representation is covered by the UN Charter Art 4(1), which states that only states can join the UN.¹⁷³ A problem arises if there are multiple organisations trying to become the government. Expulsion from the UN is covered under Art 6 for a State that persistently violates the principles. One of those principles relates to failure to pay financial contributions under Art 19, for which the consequences are loss of vote if the arrears amount to more than the

¹⁶⁸ Koskenmaki, above n 114 at p8.

¹⁶⁹ Koskenmaki, above n 114 at pp9-11. Koskenmaki cites R Howel "Link to World Imperilled. Somalia's UN Mission Penniless" *New York Newsday* (New York, 1992) see also, M Pflanz "Britain Reopens Somali Embassy After 22 Years" *The Telegraph* (UK, 2013). Koskenmaki also cites United Nations Office IRIN Special Report on Mogadishu, United Nations Office for the Co-Ordination of Humanitarian affairs, IRIN-CEA

¹⁷⁰ At pp9 -11 cites *Somali Diplomat* Case No 8B536/92, Federal Republic of Germany, Superior Administrative Court (OVG) of North Rhine Westphalia 11 February (1992) 94 ILR (1994) pp567-608). The diplomat applied for social Security assistance from the German authorities after Somalia had suspended all payments to its diplomats in September 1990.

¹⁷¹ At pp9-11.

¹⁷² "Ministry of Foreign Affairs Somalia" <www.mfa.somaligov.net/Somal%20Embassies.html>

¹⁷³ UN Charter Art 4(1).

previous two years contributions. Currently Somalia is shown as not having met its financial obligations, however, it is still able to vote until the cessation of the 68th session.¹⁷⁴ It would seem that that the UN processes lack the ability to determine whether a failed State can lose their representation when there is a lack of an effective government.¹⁷⁵

Apart from the UN and the minimal effects of the loss of effective government states also face the loss of standing in judicial proceedings. In the *Republic of Somalia v. Woodhouse Drake & Carey (Suisse) S.A and others* 1992 it was held that the lawyers for Somalia were unable to represent the state as there was no one to authorise them to do so.¹⁷⁶ The State's ability to conclude treaties is diminished due¹⁷⁷ to the lack of a recognised entity with authority to commit the state. It has been argued earlier that the representatives of the TFG and the TNG could well conclude treaties, as they are representatives of a State. While the state has lost the ability to conclude treaties it is still under obligations or previously signed treaties under the principle of continuity.¹⁷⁸ The new effective government will deal with breaches of obligations of existing treaties once it is in place.¹⁷⁹ The state also faces the permanent loss of any diplomatic or State property, which may be sold and the funds held until there is a new effective government installed.¹⁸⁰

The individuals of a State with ineffective government are hampered by the apparent powerlessness of human rights treaties. These are established for the

¹⁷⁴ Resolution adopted by the General Assembly GA Res 68/5, A/RES/68/5 2013

¹⁷⁵ Koskenmaki, above n 114 at p17.

¹⁷⁶ *Republic of Somalia v Woodhouse Drake & Carey (Suisse) S.A. and Others* 1992 3 WLR 744 at 746, D.

¹⁷⁷ At p18.

¹⁷⁸ At p20.

¹⁷⁹ At p20.

¹⁸⁰ At p19.

protection of the individual from action by the State against them¹⁸¹ and would in the event of state failure be suspended in the absence of state structures.¹⁸²

In human rights treaties both the object and the protector of the treaty is the state. With an absence of any state structure in a failed State, the protagonists are civilians or non-State actors and are therefore outside the realm of the treaty.¹⁸³ Should one of the parties become the new effective government, it is plausible that both they and their opposition could be held liable for abuses carried out by both. This would suggest that a *de facto* suspension of the treaty is in place while there is no effective government as opposed to a *de jure* suspension. There could be some protection under Common Article 3 of the four Geneva Conventions, which hold that acts of violence such as murder, mutilation, torture, taking of hostages, humiliating and degrading acts, and the carrying out of sentences without due process are prohibited.¹⁸⁴ These apply to armed conflict not of an international character so could cover the case of civil war disturbances of the nature seen in Somalia. Koskenmaki acknowledges the weakness of human rights treaties and suggests the possible application of human rights norms to the situation of a State with ineffective government.¹⁸⁵ Thürer on the other hand suggests that Common Article 3 provides the minimum standard in all circumstances following *Prosecutor v. Disko Tadic, Decision on the Defence Motion for, Interlocutory Appeal on Jurisdiction 1995 (Tadic)*.¹⁸⁶ The human being approach is surpassing the state centric approach to human rights.¹⁸⁷ Enforcement against actors who have perpetrated human rights abuses is of limited success, as these require a state organisation. Abuses carried out in situations similar to Somalia are normally the result of unsupervised soldiers

¹⁸¹ Thürer, above n 68 at p6.

¹⁸² Koskenmaki, above n 114 at p24.

¹⁸³ At p23.

¹⁸⁴ Geneva Convention III Relative to the Treatment of Prisoners of War (opened for signature 12 August 1949 entered into force 21 October 1950) Art 3(1)(a)-(d).

¹⁸⁵ Koskenmaki, above n 114 at p26.

¹⁸⁶ *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* I.L.M. Vol 35, 1996 at p54 paragraph 97, cited by Thürer, above n 68 at p8 fn19.

¹⁸⁷ Thürer, above n 68 at p8.

who are lacking in a direct chain of command and clear orders.¹⁸⁸ There are two approaches that have worked with a degree of success in bringing the perpetrators to account. The ad hoc tribunals created after the Rwanda and Serbian atrocities and the International Criminal Court, (ICC).¹⁸⁹

Individuals can be held responsible for transgressions of elements of human rights treaties, as there appears to be universal jurisdiction for some crimes against human rights.¹⁹⁰ These crimes form the backbone of so-called war crimes, torture, genocide,¹⁹¹ mass murder, rape and other forms of sexual violation. These crimes can be tried in special courts as mentioned above or the ICC.¹⁹² Following *Tadic* the responsibility for individuals and their actions has been specifically identified.¹⁹³ This responsibility is tempered by the requirement for it to be at a higher level for unorganised groups than for organised military groups.¹⁹⁴

Not only is the State still under obligations based on previous treaties signed by effective governments, it is also still responsible for violations of international law as the legal capacity of the State continues.¹⁹⁵ This though is of limited assistance in the case of States with ineffective government, the major actors are operating for private benefit and there is no government to be held responsible.¹⁹⁶ The Responsibility of States for Internationally Wrongful Acts¹⁹⁷ Art 9 assumes the existence of a government and state institutions, non of which

¹⁸⁸ At p9 and Koskenmaki, above n 114 at p27.

¹⁸⁹ Koskenmaki, above n 114 at pp28-32.

¹⁹⁰ Thürer, above n 68 at p10.

¹⁹¹ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948 entered into force 12 January 1951)

¹⁹² Brownlie, above n 55 at pp 399-417.

¹⁹³ Rome Statute of the International Criminal Court (adopted 17 July 1998 entered into force 1 July 2002)

¹⁹⁴ *Prosecutor v Dusko Tadic (Appeal judgment)* ICTY Appeals Chamber IT-94-1-A, 15 July 1999 cited by Andersson, above n 35 at p19.

¹⁹⁵ Andersson, above n 35

¹⁹⁶ Koskenmaki, above n 114 at p32.

¹⁹⁷ Responsibility of States for Internationally Wrongful Acts, above n 108

operate in a State with ineffective government, and particularly not in Somalia.¹⁹⁸ If the actors who have committed human rights breaches in the absence of the government can prove that they were not acting in or exercising governmental authority, in a situation that called for the exercise of authority, the State could conceivably escape responsibility. If however, the reverse were true then the State will be held responsible.¹⁹⁹ In Somalia the actions of those claiming to be acting in the role of the Coast Guard are fulfilling a governmental role. When they hold fishing vessels to ransom or to extract licensing fees, then the liability falls on the State.²⁰⁰ Where there is no such claim and the alleged pirates are acting for individual gain, the responsibility will not be attributable to the state. The actions of an individual may be attributable to the state where the State has failed to take some measures to stop an action by an individual or group. Where there is no state to take action there must be some political will on behalf of the new government to take responsibility for the actions of those who have created the strife and civil unrest post the institution of an effective government.²⁰¹ This is a two-step process with there being an act or omission that is attributable to the State and secondly that the act or omission was an international obligation of the State.²⁰² The State has a defence in suggesting that its responsibility was negated by *force majeure* and the civil emergency is that force.²⁰³

¹⁹⁸ Koskenmaki, above n 114 at p33.

¹⁹⁹ For further discussion see Jörg Manfred Mössner, "Privatpersonen als Verursacher völkerrechtlicher Delikte", und Joachim Wolf, "Zurechnungsfragen bei Handlungen von Privatpersonen", *Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht*, 1985, pp. 232 ff. cited by Thürer, above n 68 endnote 22. Also see Responsibility of States for Internationally Wrongful Acts Article 8 bis. n 108

²⁰⁰ *United Nations General Assembly Resolution on Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries GA Res 56/10. A/RES/56/10 2001* at p49 cites the incidence of the Republican Guard following the revolution in the Islamic Republic of Iran as cited in *Kenneth P Yeager v The Islamic Republic of Iran (Iran - US)* C.T.R vol 17 p92 (1987) at pp101-2.

²⁰¹ Andersson, above n 35 at p16.

²⁰² Responsibility of States for Internationally Wrongful Acts Art 2.

²⁰³ Koskenmaki, above n 114 at p34.

Compensation can be sought for any losses incurred as a result of the act or omission;²⁰⁴ however, the chances of recovery of compensation from an impoverished State with ineffective government would be limited.

7.1 Does State failure allow for extinction of the state?

Extinction for a State is available under three conditions; dismemberment into smaller States; incorporation into a larger State and annexation into one or more States.²⁰⁵ More is required for extinction to occur than significant changes in territory, government or population or a combination of all three.²⁰⁶ State failure or collapse, however defined, involves only the loss of effective government and its subsequent ability to maintain its rights and obligations at international law.

²⁰⁴ At p34.

²⁰⁵ Crawford, above n 54 at pp700-1.

²⁰⁶ At pp700-1.

8 Possible secession of Somaliland

As the State with ineffective government loses all cohesion it is possible that more autonomous regions might turn their thoughts to the concept of secession as a means of separating themselves from the destructive force of State collapse. Recent examples of this phenomenon include Ethiopia/Eritrea, Sudan/South Sudan, Indonesia/East Timor and Macedonia/Kosovo. The Sudanese example is the one most linked to State failure, the others provide examples of the complicated and often harrowing process that secession involves.²⁰⁷ Kosovo is an example of where an autonomous or separatist territory has become a sovereign polity.²⁰⁸

Secession exists as a method of State creation and has been utilised successfully and commonly since 1776 to approximately 1914.²⁰⁹ It has been described as a method of creation of a state by use or threat of force without consent of the former sovereign.²¹⁰ A key component of secession is the recognition of the new entity by third party States.²¹¹ Problems occur where the recognising State is not the State from which the new State is seceded.²¹² Where the initial State has not formally recognised the seceding State, recognition by a third State could be construed as forcing the mother State to recognise the new entity, as was the case with Spain and its former colonies in South America.²¹³

Somaliland was a former British Protectorate that was declared independent on 26 June 1960 prior to its incorporation into the Republic of Somalia some five

²⁰⁷ B de Villiers "The Breakup of Sudan" *Brief* (Australia, 2011) at p9

²⁰⁸ Cooley, above n 68 at p2. It is noted however, that Kosovo is arguably a unique situation.

²⁰⁹ Crawford, above n 54 at p375.

²¹⁰ At p375.

²¹¹ At p376.

²¹² At p376.

²¹³ At p 377.

days later.²¹⁴ Somaliland had negotiated away its sovereignty to achieve this.²¹⁵ Following the collapse of the Barre government in Somalia, Somaliland declared independence on the 17 May 1991 and created its own institutions of governance and developed political stability.²¹⁶ Somaliland adopted a provisional constitution following a referendum in February 1997 and a final constitution on the 31 May 2001.²¹⁷

During the course of the break up of both the USSR and the SFRY legal principles were followed that allowed the formation of new States where those States had previously been independent.²¹⁸ Latvia, Lithuania and Estonia had been recognised as independent sovereign States in the 1920s.²¹⁹ This earlier recognition made their later recognition as States much easier.²²⁰ The only obvious legal reason as to why Somaliland cannot be recognised as an independent State is that of territorial integrity. Territorial integrity is an accepted principle of international law and noted in the UN Charter and the 1960 Colonial Declaration, the 1966 International Covenants on Human Rights and the 1970 Declaration on the Principles of International Law and can be regarded as a rule of international law.²²¹ This view has been strongly held onto by States in Africa where the territorial integrity of the colonially defined territory is held in some primacy.²²² There has been widespread disapproval of attempts to secede in several African States such as the former Belgian Congo, Nigeria and the Sudan.²²³ Although in more recent times the split of Sudan and the Eritrea/Ethiopia secession has challenged this, as discussed earlier. So while the practice may be against secession happening it has still occurred. The reasoning

²¹⁴ At p90. It was recognised by the US prior to its assimilation into Somalia.

²¹⁵ Wallace-Bruce, above n 15 at p66.

²¹⁶ Wallace-Bruce, above n 15 at p67.

²¹⁷ Crawford, above n 54 at p413.

²¹⁸ Wallace-Bruce, above n 15 at p68.

²¹⁹ Rich, above n 56 at pp37-8.

²²⁰ Robert Rotberg *When States Fail: Causes and Consequences* (Princeton University Press, Princeton, 2004) at p310 cited by Andersson, above n35 at p42.

²²¹ Shaw, above n 65 at p 522.

²²² At p526.

²²³ At p526.

behind the lack of recognition by the international community seems to be founded in political pragmatism.²²⁴ One of the strong arguments for the ability to secede is lodged in the concept of self-determination of peoples. Shaw argues that self-determination fits within the concept of territorial integrity as he suggests that it cannot apply once a territory gains sovereignty and independence.²²⁵ He does however suggest that 'extreme circumstances' would override this.²²⁶ The collapse of a State or the sustained loss of effective government must surely fit within the concept of 'extreme circumstances.' One of the major drawbacks to the recognition for Somaliland is the apparent lack of an effective government in the State from which they wish to secede, as this would be required for them to be recognised. In support of the secession of Somaliland is the fact of the secession of both South Sudan and Eritrea, neither of which has created the rush of copycat secessions that has been much feared.²²⁷

²²⁴ Wallace-Bruce, above n 15 at p 68.

²²⁵ Shaw, above n 65 at p523.

²²⁶ At p523.

²²⁷ Wallace-Bruce, above n 15 at p69.

9 Conclusion

The concept of a failed State provides numerous challenges to the international community and for the State unfortunate enough to be labelled one. One of the major causes of these challenges is that terminology around States with ineffective government is the lack of a clearly defined legal status. There is much debate over the various terms utilised by the writers and the creation of a sliding scale of failure does not enhance the situation. Indeed writers have called for the banishment of the term from the international lexicon for just those reasons.²²⁸ The use of the term helps keep the afflicted State on the margins of international relations and does not assist the State.²²⁹

The inability of the international community, including international institutions to conceive of something other than a functioning State as part of the community, is a hindrance to the efficient, legitimate, processes required to assist the State from reconstituting itself in a functioning, non-threatening manner. Recognition needs to be paid to history and acknowledge the process of gaining and maintaining statehood is one fraught with difficulties and has been dealt with at various times by a number of current members of the international community in their past. The lack of clear principles and approaches to respond to these crises leads to less than satisfactory approaches being taken.²³⁰

It is clear that any measure taken to remove the word State from the political entity will only create more problems that it will solve. The process of decertification has been suggested, but in a community that is founded on and functions on the State as the major actor in international relations, this would

²²⁸ S Eisenstrager "Failed State or Failed Label? The concealing concept and the case of Somalia" (2012) e-International Realties at p8.

²²⁹ At p8.

²³⁰ Koskenmaki, above n 114.

only serve as an intimidatory approach when what is needed is conciliatory approach.²³¹ This would raise the issue of naming the decertified entity with a new label and assigning legal consequences that follow from its usage. Something that has not to date been achieved for the label of a failed State. In an increasingly interdependent world of state communities perhaps it is time to suggest that the barrier, the concept of a state, be removed altogether. While the State still exists control is and responsibility is limited to what is 'ours', in an internal sense, as opposed to what we all share, in an external, global sense.

²³¹ Herbst, above n 4 at p143.

Chapter 3

Illegal Fishing

I am the Horn of Africa
 I was paradise, I was pure
 Tropical trees, beautiful beaches
 I was perfection I assure
 (Helwaa)¹

Introduction

Illegal, Unreported and Unregulated (IUU) fishing is a serious global problem that removes approximately USD4Billion – USD9Billion per year from worldwide fisheries.² The majority, some USD2.75Billion – USD7.25Billion, comes from the Exclusive Economic Zones (EEZ) of coastal States.³ The removal of former fishing grounds from global access and the restructuring of seas into the EEZ, over which coastal States were granted jurisdiction with the advent of the United Nations Convention on the Law of the Sea,⁴ (UNCLOS), increased pressure on the fishing stocks available within the new zones.⁵ These changes combined with improved fishing technologies that have increased the quantity of catch per vessel and increased investment in the industry have created an over capacity of fishing vessels.⁶ Over capacity of fishing vessels, and the over exploitation of

¹ Cachia, above Chapter 1 n 1.

² H Knight *Closing the Net: Stopping illegal fishing on the high seas* (High Seas Task Force, London, 2006) at p3.

³ High Seas Task Force, above n 2 at p3.

⁴ United Nations Convention on the Law of the Sea UNTS I 31363, (opened for signature 10 December 1982, entered into force 16 November 1994)

⁵ Elliot Anderson “It's a Pirates Life for Some: The Development of an Illegal Industry in Response to an Unjust Global Power Dynamic” 2010 17(2) *Ind. J. Global Legal Studies* at p327.

⁶ Rachael Baird “Illegal, Unreported and Unregulated Fishing: An Analysis of the Legal, Economic and Historical Factors Relevant to its Development and Persistence” 2004 5 *Melbourne Journal of International Law* 1 at p2

fishing stocks has led to higher competition for diminishing amounts of fish. States with distance fishing fleets have been squeezed out of lucrative areas as EEZs became more operative.⁷ The combination of these problems along with the increased global demand for fish, increases in the return on fish catch, increased pressure on already over exploited fish stocks and undermines sustainable fisheries management.⁸ The higher rate of exploitation of fish stocks the greater the rate of illegal fishing.⁹ This increased rate of illegal fishing is exacerbated by the lack of new or alternative fishing opportunities.¹⁰

A disproportionate amount of the losses that occur through IUU fishing comes from developing countries, in particular about USD1Billion from sub-Saharan Africa.¹¹ IUU fishing is particularly prevalent where poor governance leads to a failure of state control over, not only those foreign vessels licensed to fish, but also local artisanal fishers.¹² The coastal waters of developing countries, like Somalia, are particularly vulnerable as they lack the resources to effectively patrol their sovereign jurisdictions. The problem is exacerbated when there is ineffective government and those resources, or public goods, offered by the State have disappeared altogether.¹³

As discussed in the previous chapter, the Somalia government collapsed in 1991, and since that time incidents of illegal fishing have become escalated. Vessels

⁷ At p9 cites China, European States, Japan and Korea.

⁸ Stefan Flotham and others "Closing Loopholes: Getting Illegal Fishing Under Control" (2010) <[www.sciencexpress.org/20 May 2010/page1/10.1126/science.1190245](http://www.sciencexpress.org/20%20May%202010/page1/10.1126/science.1190245)>

⁹ Mssra Stokke and Davor Vidas *Regulating IUU Fishing or Combating IUU Operations* IUU Workshop (Organisation for Economic Co-operation and Development, 2004) at p8.

¹⁰ David Agnew and others "Estimating the Worldwide Extent of Illegal Fishing" 2009 4(2) PLoS One at p5.

¹¹ Knight, above n 2 at p3.

¹² Agnew and others, above n 10.

¹³ Mahamuda Bawumia and Rashid Sumaila "Fisheries, Ecosystems and Piracy: A Case Study of Somalia" 2010 Working Paper (2010-04) The University of British Columbia at p6.

allegedly involved come from a wide range of global fishing nations.¹⁴ This is not surprising as Somalia's nutrient rich waters are home to some of the most productive fish stocks in the world.¹⁵ The value of fish stocks taken from the waters off Somalia by foreign fleets is estimated in excess of some USD300 million annually.¹⁶

The abundance of fish has been utilised by two main tribal groups, the Banjuni and the Amarari¹⁷ peoples, who are descended from the Arabian, Indian and Persian seafaring settlers who arrived over 1000 years ago.¹⁸ These early settlers were joined by clans from inland Somalia as part of a government resettlement programme following two major droughts in 1974 and 1986.¹⁹ The resettlement was to help replace the major source of protein that had been lost through the demise of livestock. The resettled people developed into large fishing communities who started to reap the rich harvest from the seas of the Indian Ocean.²⁰

The aftermath of the drought in 1974 was so severe that Somalia invested in establishing an industrial fishing fleet with the USSR called SOMALFISH in an effort to replace lost protein.²¹ This venture was short lived, being terminated when Ethiopia and Somalia went to war against each other in 1975 forcing the USSR to side with one of its client States.²² The decision by Russia to choose

¹⁴ Ishaan Tharoor "How Somalia's Fishermen Became Pirates" (2009) <www.time.com/time/world/article/0,8559,1892376,00.html> at p2.

¹⁵ Bawumia and Sumaila, above n 13 at p7.

¹⁶ Johann Hari "You are being lied to about pirates: Some are clearly just gangsters. But others are trying to stop illegal dumping and trawling" (2009) United Kingdom at p2. There is no external validation of this figure.

¹⁷ Agnew and others, above n 10 at p5.

¹⁸ At p5.

¹⁹ Mohammed Waldo "The Two Piracies in Somalia: Why the World Ignores the Other" *Wardheer News* (8 January 2009) at p3.

²⁰ Emmanuel Sone "Piracy in the Horn of Africa: The Role of Somalia's Fishermen" (Naval Postgraduate School, 2010) at p14.

²¹ At p14.

²² At p14.

Ethiopia, and the withdrawal of Russia's support, contributed to the consequent decline in fish catch.²³ This initial fishing venture was replaced with another in 1981; the joint Italian and Somalian venture SOMITFISH.²⁴ This venture was replaced after two years with another joint Italian venture SHIFCO with five trawlers being donated by the Italian government, which lasted through to the loss of effective government in Somalia in 1991.²⁵ These ventures were responsible for the industrialisation of the Somalian fishing industry, taking the catch from a mere 6000 tonnes in 1974 to almost 24,000 tonnes in 1991²⁶ generating approximately USD15 million worth of exports in 1990.²⁷

The loss of government, mentioned previously, with the attendant absence of patrol and enforcement vessels,²⁸ combined with the sudden erasure of taxation for foreign fleets,²⁹ created the conditions for Somalia's coastline to become a haven for foreign fishing fleets to fish illegally. These conditions were taken advantage of by the European and Asian fishers particularly, who were able to deplete Somalia's fish stocks, a reason given for the cause of poverty and social decay in coastal towns.³⁰ The number of vessels fishing illegally has been estimated at between 200 and 800 vessels depending on the source.³¹ The writers of the Marine Resource Assessment Group report allege that these

²³ N Van Zalinge "Summary of Fisheries and Resources Information for Somalia" in M Sanders (ed) *Proceedings of the Workshop on the Assessment of the Fishery Resources in the Southwest Indian Ocean(SWIOP/WP/41)* (Food and Agriculture Organization of the United Nations, United Nations Development Programme, Albion, Mauritius, 2010) at p1.

²⁴ Sone, above n 20 at p14.

²⁵ At p14.

²⁶ "Fisheries and Aquaculture Country Profiles-Somalia" (2005)

<www.fao.org/fishery/countrysector/FI-CP_SO/3/en; cited by Sone, above n 20 at p15.

²⁷ Aaron Arky "Trading Nets for Guns: The Impact of Illegal Fishing on Piracy in Somalia" (Naval Postgraduate School, 2010) at p15.

²⁸ Anderson, above n 5 at p327.

²⁹ Arky, above n 27 at p7.

³⁰ Anderson, above n 5 at p327.

³¹ Sone, above n 20 at p28. In 1998 Sone cites approximately 300 vessels and Leigh Phillips "The European Roots of Somali Piracy" *EU Observer* (21 April 2009) at p2, 2004 estimated at 700 vessels. *Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries* (Marine Resources Assessment Group, London, 2005) at p166.

vessels are fishing illegally.³² The methods used by these vessels, such as deep bottom trawling and dynamiting, have damaged the environmental base that supports the valuable fish species of Somalia.³³

Illegal fishing has caused a decline in the local Somali catch from some 25,500 tons to 20,600 tons. It is estimated that the possible illegal catch is in the vicinity of 90,000 tons per year.³⁴ As alluded to earlier, the vessels involved in illegal fishing come from a range of countries including, China, France, Germany, Honduras, India, Italy, Japan, Kenya, Korea, Pakistan, Portugal, Russia, Saudi Arabia, Spain, Sri Lanka, Taiwan, Thailand, United Kingdom, and the Yemen. As would be expected, these illegal fishers are no respecters of the coastal State's jurisdiction over the established zones out to 200M as it is alleged that some fish well within the 12M territorial sea zone and even in sight of artisanal fishing nets close to shore.³⁵

Illegal fishing has been defined under the Food and Agriculture Organisation of the United Nations Plan of Action to Prevent Deter and Eliminate Illegal, Unreported and Unregulated Fishing, (FAO IPOA-IUU),³⁶ Art 3.1 – 3.1.3, as being conducted by national or foreign vessels in waters under jurisdiction of a state, without permission of that state or in contravention of its laws and regulations.³⁷ It also applies to vessels that conduct fishing in a Regional Fisheries Management Organisations, (RFMO), where the flag State is a party to the RFMO, but operates

³² MRAG, above n 31 at p166.

³³ D Duda and T Szubrycht "The Somali Piracy: New or Old Challenge for International Community" 2009 3(3) International Journal on Maritime Navigation and Safety of Sea Transportation at p346. Gabobe Musse and Mahamud Tako "Illegal Fishing and Dumping Hazardous Wastes Threaten the Development of Somali Fisheries and the Marine Environments" (Tropical Aquaculture and Fisheries, Teregganu Malaysia, 7-9 Sept 1999 1999) at p4.

³⁴ MRAG, above n 31 at p 113.

³⁵ Musse and Tako, above n 33 at p4.

³⁶ Food and Agricultural Organization of the United Nations, International Plan of Action to Prevent, Deter and Eliminate, Illegal, Unreported and Unregulated Fishing (Rome 2001).

³⁷ FAO IPOA-IUU, Art 3.1.

in contravention of the measures of that RFMO or of the relevant provisions of the applicable international law.³⁸ Although both Unreported and Unregulated are included in the acronym IUU, the term is used in this thesis with the more narrow definition as contained under the FAO IPOA-IUU article for illegal fishing.

The incursion into Somalia's coastal waters by foreign fishing vessels has generated a variety of responses from Somalians. These responses have included, resorting to piracy,³⁹ the creation of alleged Coast Guards by warlords,⁴⁰ and regional governments employing Private Security Companies, (PSCs), to perform Coast Guard duties on their behalf.⁴¹

Further complicating the issue of illegal fishing off the Somali coast is the lack of specific, verifiable and accurate data in relation to illegal fishing. There are two possible causes for this; the very fact that it is illegal fishing creates an aversion to reporting on these activities and the current security situation in Somali that precludes the gathering of accurate data. There are many claims about illegal fishing and the numbers of vessels involved as discussed above.⁴² There is no indication however as to how these figures are reached. There is no indication of the distances from shore of these vessels, what zones they were allegedly in or if they may have been fishing in an RFMO.

It is the purpose of this chapter to review the international fisheries framework with particular emphasis on how it is designed to eliminate illegal fishing through the obligations and rights of States in treaties and soft law agreements.

³⁸ FAO IPOA-IUU, Art 3.1.2.

³⁹ Edward Allison and Ingrid Kelling "Fishy Crimes: The Societal Costs of Poorly Governed Marine Fisheries (paper presented at NTS Asia Workshop, Singapore, November 2009)"; at p3.

⁴⁰ Arky, above n 27 at p39.

⁴¹ Stig Hansen "Private Security & Local Politics in Somalia" 2008 35 Review of African Political Economy 585 at pp587, 590, 594.

⁴² Sone and Phillips above n 31.

It will then examine the state of Somalia's maritime zones as they currently appear and explain how the current lack of clarity contributes to the issue of illegal fishing and examines some possible interpretations of how these apply in Somalia. It will also compare various responses to the problem of illegal fishing by the international community, regional Somali governments and the artisanal fishers, to assess the legality of those responses. Finally the chapter will offer some suggestions for possible improvements to the international legal regime to minimise the problem of illegal fishing specifically around the coast of Somalia and generally for the international community.

10 Framework of fisheries management

The waters off the coast of Somalia are home to a valuable maritime resource, especially high value fish stocks like, lobster, mackerel and tuna, with an estimated annual value of USD5 million.⁴³ Any reduction in access to these valuable fish stocks off the coast of Somalia directly affects the livelihood of the artisanal fishers.⁴⁴ The value of fish stocks taken from the waters of Somalia by foreign illegal fleets is estimated in excess of USD300 million.⁴⁵

The vessels involved in illegal fishing utilise loopholes in the existing fisheries regime to flout any and all regulations covering fishing to maximise their profits on the high value fish stocks.⁴⁶

The international fishing regime is governed by various articles within the United Nations Convention on the Law of the Sea, (UNCLOS), as well as a number of agreements and treaties supported by municipal law.⁴⁷ Somalia ratified the UNCLOS in 1989 just prior to the loss of effective government.

UNCLOS creates and codifies the zones and establishes the limits of jurisdiction for sovereign coastal States. The various zones under UNCLOS are, the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf and the high seas.

⁴³ Food and Agricultural Organization of the United Nations “Profil De La Pêche Par Pays” <www.fao.org/fi/oldiste/en/SOM/profile.htm > at p2.

⁴⁴ Agnew and others, above n 10 at p3.

⁴⁵ Tharoor, above n 14 at p2.

⁴⁶ Stokke and Vidas, above n 9 at p27.

⁴⁷ United Nations Convention on the Law of the Sea UNTS I 31363, (opened for signature 10 December 1982, entered into force 16 November 1994)

The territorial sea is codified under Arts 2, 3 and 4 the UNCLOS. Art 2 extends State sovereignty from a States land territory out in to the adjacent waters to be known as the territorial sea. Sovereignty is constrained in this area under Art 2.3 to that created under the convention and by international law. Art 3 establishes the right of a sovereign State to establish a territorial sea up to a maximum limit of 12M from the baselines as determined under the convention. Baselines are established under Art 7 of UNCLOS and normally extend from the low water mark. In cases where the coastline is indented or cut into, then it is acceptable to adopt a straight-line measure between appropriate points of land.⁴⁸ The adoption of the straight-line measure was the result of the *Anglo-Norwegian Fisheries* case.⁴⁹ This was a challenge by the United Kingdom to Norway over their use of straight line measuring to establish baselines in areas where rocky outcrops had been used to measure the baseline and thus extend the seaward extent of its coastal zones. Art 7 codifies the right of innocent passage for vessels of all states through the territorial sea. Art 19(1) defines innocent passage as passage that is not prejudicial to the peace, good order or security of the coastal State. Art 19(2) defines a number of acts that are considered to be prejudicial to the peace, good order or security of a coastal State. Art 19(2)(i) declares fishing activities as one of those acts. Art 25(1) gives a coastal State the power to take the steps necessary in its territorial sea to prevent passage, which is not innocent. Art 27(1) allows a coastal State to exercise criminal jurisdiction onboard a foreign vessel passing through its territorial sea by conducting an arrest or investigation if the consequences of the crime extend to the coastal State, (Art 27(1)(a)), or if the crime is of such a nature to disturb the peace of the country or the good order of the territorial sea, (Art 27(1)(b)).

Art 34 of the UNCLOS codifies the contiguous zone, which extends out to 24M from the baseline used to create the territorial sea. This zone empowers the coastal State to regulate customs, immigration, fiscal and sanitary laws and

⁴⁸ UNCLOS Art 7.

⁴⁹ *Fisheries (United Kingdom v Norway)* I.C.J Reports [1951] p116 at 133.

regulations within its territory or territorial sea and to punish those who infringe within the territory or territorial sea.

The Exclusive Economic Zone is created under Art 55, and Art 56 the UNCLOS creates the rights and duties of the coastal State in relation to that zone. The rights that are created give the coastal State exclusive sovereign rights to exploit and explore, conserve and manage the natural resources of that zone including living resources, Art 56(1)(a). Art 56(1)(b)(iii) establishes jurisdiction for the protection and preservation of the marine environment.

It could be argued that the language contained in the UNCLOS has in a small way contributed to, not only the over exploitation of fisheries by coastal States,⁵⁰ but also to the damage done by illegal fishers.⁵¹ Art 56(1)(a) UNCLOS grants ‘...sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources...’ The problem is that exploiting carries with it negative connotations, more associated with making use unfairly or mainly for one’s advantage, to cash in on, abuse, impose on, leverage, milk, use, and trade on.⁵² Although the use of this phrase is minimised by the addition of the ‘conserve and manage’ functions, they follow later in the article and could be seen as not being of equal importance. Flotham holds that the greater the amounts of exploitation the greater the amount of illegal catch.⁵³ The action of exploitation is further mitigated by Art 61 UNCLOS, which deals with conservation of the living resources of the EEZ.

⁵⁰ R Willmann, K Kelleher and R Arnason *The Sunken Billions: The Economic Justification for Fisheries Reform* (The World Bank, Washington, 2009) at p3.

⁵¹ Allison and Kelling, above n 39 at p1.

⁵² Eric Partridge Webster Universal Dictionary, at p491.

⁵³ Flotham and others, above n 8 at p1.

Art 57 establishes the breadth of the EEZ at a maximum of 200M established from the same baseline as the territorial sea. There is no statement in UNCLOS as to when an EEZ exists although Art 75 stipulates that the geographical coordinates need to be notified on maps and charts and also be deposited with the Secretary General of the UN. Art 75(2) requires that the geographic coordinates charts and maps be publicly declared. For an EEZ to exist it needs to be expressly proclaimed. The right to an EEZ is not a default right that exists on the ratification of the UNCLOS. Art 58(1) establishes the rights and duties of other States in the EEZ. These rights pertain to navigation and overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms. Art 61(1) grants the power for the coastal State to determine the allowable catch of living resources in the EEZ. Art 61(2) requires the coastal State to take into account scientific evidence when determining the conservation and management measures to ensure that over exploitation does not take place. These measures should be instituted in such a way that levels can be maintained that allow for the maximum sustainable yield. Any measures taken should take into account the needs of coastal fishing communities and developing States, (Art 61(3)). Art 62(1) requires the coastal State to seek to gain optimum utilization of the living resources without affecting its duties under Art 61. Art 62(2) and (3) relate to the determination of the ability of the State to harvest the maximum allowable catch and to give other States, particularly developing States the right to harvest excess capacity, although this is constrained by Art 71 in the case of States whose economy is overwhelmingly dependent on exploitation of living resources of the EEZ. UNCLOS Art 73 creates the right for the coastal States to enforce their municipal law regarding fisheries.

The next zone codified under UNCLOS is the continental shelf. Art 76 defines the continental shelf as comprising the seabed and subsoil of the submarine areas that extend beyond the territorial sea to the outer edge of the continental margin or to a distance of 200M from the baseline used to establish the territorial sea.

The breadth of the continental shelf is constrained under Art 76(5) to no more than 350M from the baselines or 100M from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres.⁵⁴ The coastal State exercises exclusive rights of exploration and exploitation over the natural resources, (Art 77 (1)(2)), which include mineral and non-living resources of the seabed and sedentary species which are either immobile or unable to move except in constant contact with the seabed.

The next zone is the high seas, (HS), created under Art 86 of the UNCLOS as being that part of the oceans that do not form part of the EEZ, territorial sea, internal waters of a State or the archipelagic seas of an archipelagic State.⁵⁵ The freedoms that exist to operate on the HS are spelled out in Art 87 including Art 87(1)(e) which includes the freedom to fish, which is constrained under Art 87(2) to pay regard to the rights of other States, under this article, to exercise the same freedom and the rights under the UNCLOS in this area.⁵⁶

This obligation applies to the HS as opposed to the coastal states that have greater powers of enforcement and control. The obligation to report has been described as more of a concept than a reality and as the prime reason why vessels register under flags of convenience, (FOC), States who refuse to exercise control over illegal fishing vessels registered to them.⁵⁷ Part of the reason for the failure of this article to stop illegal fishing is the prohibition on non-flag States investigating the breaches of the international fishing regime, if a flag State

⁵⁴ Somalia has only recently submitted on its intention to claim a continental shelf out to the 350M limit.
<www.un.org/Depts/los/clcs_new/submissions_files/som74_14/Somalia_Executive_Summary_2014.pdf>.

⁵⁵ UNCLOS Art 87

⁵⁶ UNCLOS Art 87(2)

⁵⁷ Ryan Cantrell "Finding Nemo and Eating Him: The Failure of the United Nations to Force Internationalisation of the Negative Social Costs that Result from Overfishing" 2006 5 Wash. U. Global Stud. L. Rev. 381 at p388.

refuses to meet their obligations there is nothing a non-flag State can do.⁵⁸ The resistance by flag States to enforce these obligations is related to the concept of *pacta tertiis*, where these States refuse to comply with their obligations, as they believe that the international community is regulating municipal law.⁵⁹

Closely linked to the concept of FOC is the requirement that there be a genuine link between the flag State and the vessel registered.⁶⁰ It has been argued in the *M/V Saiga* that the absence of exercise of jurisdiction amounted to a lack of a genuine link.⁶¹ The International Tribunal for the Law of the Sea, (ITLOS), held that absence of proper jurisdiction and control does not equate to an absence of a genuine link and the inability of the vessel to fly the State flag under which it is registered.⁶² The genuine link requirement has not been defined under the UNCLOS or a set of criteria created for establishing the requirement.⁶³ This has led to the situation where a genuine link can be as little as a post office box in the flag State used by the registered owners.⁶⁴ In the *Grand Prince* ITLOS held that the registration of the vessel under the flag of Belize contained an element of fiction⁶⁵ and was insufficient to support the claim that the vessel was registered to fly the flag of that State.⁶⁶ Further attempts to more closely define this link have been defeated as efforts to establish the 1986 UN Convention on Conditions for the Registration of Ships, which would have clearly enunciated the

⁵⁸ Flotham and others, above n 8 at p14.

⁵⁹ Vienna Convention on the Law of Treaties, above Chapter 2 n 103, *pacta tertiis nec nocent nec prosunt*. A treaty does not create rights or obligations for a third State without its consent.

⁶⁰ UNCLOS Art 91(1)

‘Ships have the nationality of the State whose flag they are entitled to fly. There must exist a *genuine link* between the State and the ship.’

⁶¹ *The M/V Saiga (No 2) Unreported* ITLOS Case No 2 (1 July 1999) at paragraphs [82]-[83].

⁶² Baird, above n 6 at p16.

⁶³ Baird, above n 6 at p18 fn90. The link was quite tenuous in the *M/V Saiga (No 2)*, where the vessel was owned by a Cypriot shipping company, managed by a Scottish firm and crewed by Ukrainians.

⁶⁴ Stokke and Vidas, above n 9 at p7.

⁶⁵ *The Grand Prince (Belize v France) (No 8)* ITLOS No 8 at paragraph [85].

⁶⁶ At paragraph [85]. Kathleen Gray, Fiona Legg and Emily Andrews-Chouicha *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* (OECD, 2004) at p389.

conditions, failed.⁶⁷ In a move to tighten up this loophole, states such as Australia, require vessels to be owned by Australian companies to fish under permit or statutory fishing rights.⁶⁸

Arts 117-119 cover the conservation and management of the living resources on the HS. These articles cover the duty of States to adopt measures for the conservation of the living resources of the HS as far as their nationals are concerned, the cooperation of States in conservation and management of the living resources and the conservation of living resources on the HS. Art 197 requires further conservation measures be carried out on a regional basis by implementing international rules and standards and recommended practices and procedures for the protecting and preservation of the marine environment.

While it could be argued that this does not apply directly to the fisheries, the *Southern Blue Fin Tuna* cases (New Zealand v Japan)(Australia v Japan) stated at paragraph 70,

‘Considering that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.’⁶⁹

Art 64 along with Art 63 gave rise to the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling

⁶⁷ United Nations Convention for the Registration of Ships (open for signature from the 1 May 1986 to the 30 April 1987 in New York, (not effective as yet). The Convention will come into force 12 months after the date on which not less than 40 States, the combined tonnage of which amounts to at least 25 per cent of the world tonnage, have become Contracting Parties to it in accordance with Article 18.

⁶⁸ Stokke and Vidas, above n 9 at p23.

⁶⁹ *Southern Blue Fin Tuna (New Zealand v Japan)(Australia v Japan) (Order for Provisional Measures)* ITLOS 3 & 4, 38 ILM 1624 at paragraph 70.

Fish Stocks and Highly Migratory Fish Stocks,⁷⁰ (FSA). The aim of this agreement is to address the inadequacies of high seas fisheries management, address issues of unregulated fishing, overcapitalisation, and excessive fleet size, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases and lack of cooperation between States.⁷¹ There have been to date only 80 signatories to the agreement, which is only binding on the contracting parties.⁷² Somalia is not a signatory to this agreement as it was formulated after the collapse of the government in 1991. The species of fish stock that is covered by this agreement and most applicable to the waters off Somalia's coast is tuna.⁷³

Art 5(b) of the FSA requires states to utilise the best scientific evidence to inform conservation and management practices and to take account especially of the needs of developing States, which is further reinforced by Art 5(h), prevention of overfishing and Art 5(i) which asks states to be cognizant of the interests of artisanal and subsistence fishers. These three articles together would appear to provide sufficient protection for the fishers of Somalia, although the FSA is limited to the control of fisheries on the HS, there are requirements under Arts 6 and 7 that apply to conservation within the jurisdiction of the State. It could be argued that the uncertainty over the extent of the territorial sea of Somalia would see articles, 5(b), 5(h) and 5(i) be applied, either to the very high-water mark on Somalia's coast or to the 3M territorial limit once claimed.

⁷⁰ The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (opened for signature 4 December 1995, effective 11 December 2001)

⁷¹ FSA above n 70 at p2.

⁷² "UN Division for Ocean Affairs and the Law of the Sea."

<www.un.org/Depts/los/reference_files/chronological_lists_of_ratification.html#agreement%20for%20implementation%20of%20provisions%20of%20the%20Convention%20relating%20to%20the%20conservation%20and%20management%20of%20straddling%20fish%20stocks%20and%20highly%20migratory%20fish%20stocks, >

⁷³ The UNCLOS Annex 1.

In compliance with Art 61(2) of the UNCLOS and Art 26(2) of the FSA, RFMOs have been established across large portions of the HS including the Pacific, Antarctic and Indian Ocean. There are two RFMOs in the region off the coast of Somalia, the Indian Ocean Tuna Commission,⁷⁴ (IOTC), and the Southern Indian Ocean Fisheries Agreement,⁷⁵ (SIOFA). The major problems that Somalia faces with these agreements is that they came into being after the collapse of the Barre government and therefore Somalia is not a contracting party and secondly, it is specifically for tuna type species and the other lucrative fish stocks; lobster and shrimp are overlooked.

The area covered by the IOTC is that under the FAO statistical areas 51 and 57; the area pertinent to Somalia is area 51, the western side major fishing area and sub areas 3 and 5. There is no indication that these areas exclude the 200M zones in the agreement or under FAO statistical areas 51(3) and (5). The IOTC is reliant on the implementation of conservation and management measures and the imposition of penalties for violations of the measures agreed to under Art IX (1)-(8) within national legislation. Each State still retains its rights under the UNCLOS to exploit resources in its waters up to 200M from its coast.

SIOFA applies in this region but stops 200M from the coastline of States.

The fish caught off the coast of Somalia must be taken to port and then to market to be sold. It is on arrival at these ports that the Agreement on Port State Measures to Deter, Eliminate and Prevent Illegal, Unreported and Unregulated Fishing comes into play.⁷⁶ Art 13(c) provides detail as to what authorised inspectors are able to examine, including all areas of the vessel, the fish catch,

⁷⁴ The Agreement for the Establishment of the Indian Ocean Tuna Commission (opened for signature 27 October 1995, entered in to force 27 March 1996).

⁷⁵ Southern Indian Ocean Fisheries Agreement (opened for signature 7 July 2006, not yet in force).

⁷⁶ Agreement on Port State Measures to Deter, Eliminate and Prevent Illegal, Unreported and Unregulated Fishing (opened for signature on the 22 November 2009, not yet in force), out of 28 signatories only 4 ratifications so far.

nets and equipment and documents and other records to ensure compliance with relevant conservation and management measures. The measures have been criticised for their lack of transparency, accountability and global reach.⁷⁷ Flotham further identifies the lack of vessel information and lack of compliance by ports as significant challenges to port States.⁷⁸ Port State effectiveness is limited by the requirement to notify the flag State and leave the decision to prosecute to it, if evidence that a vessel has been involved in illegal fishing is found, (Art 15).

The other main treaty regulating conservation and management of global fisheries that is legally binding on signatories is the Agreement to Promote compliance with International Conservation and Management measures by Fishing Vessels on the High Seas, (Compliance Agreement).⁷⁹ Initially signed by 25 states, an assessment of the effectiveness of this agreement indicated that of 33 signatories, 16 failed to curb illegal fishing utilising this agreement.⁸⁰ The major challenge to this agreement is the ability of FOC to fail to regulate their fishing fleets.⁸¹

There are a number of 'soft law'⁸² agreements that aim to regulate fishing globally, including the FAO Code of Conduct for Responsible Fisheries,⁸³ (Code of Conduct), and the FAO IPOA-IUU. Both of these agreements are voluntary and have had limited uptake. The FOA IPOA-IUU suffers from the same limitations as

⁷⁷ Flotham and others, above n 8 at p1.

⁷⁸ At p2.

⁷⁹ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (opened for signature 24 November 1993 entered into force 24 April 2003)

⁸⁰ Agnew and others, above n 10 at p4.

⁸¹ Flotham and others, above n 8 at p16.

⁸² Shaw Chapter 2 n 65 p117-8. Soft law is not law, but more likely to be a code of practice or standards, or guidelines that may be ultimately converted into legally binding rules.

⁸³ Code of Conduct for Responsible Fisheries (adopted 31 October 1995)

other agreements and treaties in that FOC States manage to easily thwart the intentions of the parties to limit illegal fishing.⁸⁴

It can be seen that although there are a number of binding and non-binding instruments to regulate fishing both within the territorial jurisdiction of States and on the HS, they all require a functioning State to implement the provisions and to actively police those provisions with sufficient resources to curb the activities of those determined to fish illegally. Although there are a number of provisions where states could exercise some form of control over their fishing fleets to limit the actions of illegal fishers, the loopholes that currently exist make it easy for these regulations to be avoided. It has also been suggested that there is a lack of political will to reign in both nationals and national fishing fleets that are determined to continue illegal fishing.⁸⁵

⁸⁴ Flotham and others, above n 8 at p7.

⁸⁵ Cantrell, above n 57 at p400.

11 Does the Lack of a declared EEZ contribute to the illegal fishing problem?

11.1 Somalia's existing zones.

For illegal fishing to occur according to the definition in the FAO IPOA-IUU there must be some form of control over a particular zone of water by either a coastal State or some form of international organisation. This requires a clear definition of the zone and limits imposed on the controlling State or organisation. For any IUU operator, the abstract legal construction of coastal State jurisdiction in coastal zones matters only to the extent that effective physical control at sea can be expected.⁸⁶ In the case of Somalia this delimitation and the extent of jurisdiction is anything but clear.

Somalia, prior to the establishment of the UNCLOS, claimed a territorial sea with an outer limit 200M from its coast under Somali Law 37 (Territorial Sea and Ports (Somalia) Art (1) in 1972.⁸⁷ As mentioned above Somalia ratified the UNCLOS in 1989. Maintaining a claim of a 200M territorial sea is in direct conflict with international law as under CIL 12M is the accepted maximum limit for a territorial sea. Somalia at the time of ratification of the UNCLOS entered no objections or declarations.⁸⁸ It has persisted in maintaining that its territorial sea extends to 200M, and has declined to repeal its claim of a 200M territorial sea.⁸⁹

It could possibly be claimed that Somalia was a persistent objector as to the extent of its territorial sea. A persistent objector is a state that persistently

⁸⁶ Stokke and Vidas, above n 9 at p27.

⁸⁷ Somali Law 37 (Territorial Sea and Ports) 1972 Somalia, Art. 1.

⁸⁸ "UN Conventions and Agreements."

<www.un.org/Depts/los/convention_agreements/convention_declarations.htm>

⁸⁹ *U.S. v Salad* 779 F.Supp. 2d 503 E.D. (Va 2011).

objects to a rule of CIL as it is being formed and is not bound by that rule.⁹⁰ The claim to be a persistent objector however needs to be compared with Britain who during the late 1960s issued several declarations that it did not recognise territorial seas over more than 3M.⁹¹ Somalia has not followed the example set by Norway in the *Fisheries* case and expressed its objection to the 12M territorial sea zone as codified by the UNLCOS. Unlike Peru in the *Asylum* case, Somalia has ratified the UNCLOS, so that ground of establishing its cause as a persistent objector is also denied to it. It is strongly suggested that Somalia is unable to claim to be a persistent objector as there is no credible evidence that it has raised any objection to the establishment of the 12M limit for a territorial sea.

There is the possibility that Somalia's claim to a 200M territorial sea is part of regional customary law or tradition. This concept was recognised as existing in the *Rights of Passage* case where the International Court of Justice, (ICJ), held that the standard of proof required to establish custom needed to be of a higher standard than that required to establish CIL and that the activity needed to be accepted by a state or states as an expression of a legal obligation or right.⁹² This compares with CIL where a consensus of a majority or substantial minority of interested States can be sufficient to create new CIL.⁹³ This concept is linked to the theory that a State is bound to that which it consents.⁹⁴ While there are some States still claiming a 200M territorial sea it would be hard to argue that these states form a region as they are spread across the both Africa and Latin America.⁹⁵ These claims to 200M territorial sea are not reflective of CIL or the

⁹⁰ Ted Stein "The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law" 1985 26 Harv.Int'l L. J. at p457. *Fisheries (United Kingdom v Norway)*, above n**Error! Bookmark not defined.** at p131 and *Columbian-Peruvian asylum (Colombia v Peru) (1950)* I.C.J. Reports,1950, p266 at [89]

⁹¹ R R Churchill and A V Lowe *The Law of the Sea* (3rd ed, Manchester University Press, Manchester, 1999) at p78.

⁹² *Rights of Passage over Indian Territory (Portugal v India) (1960)* I.C.J. Reports 6 at p44.

⁹³ H Thirlway "The Sources of International Law" in Malcom Shaw Chapter 2 n 65 at p92.

⁹⁴ At p92 and Vienna Convention on the Law of Treaties, above Chapter 2 n 103.

⁹⁵ Donald Rothwell and Tim Stephens *The International Law of The Sea* (Hart Publishing, Oxford and Portland, 2010) at p72 cite Benin, Congo, Ecuador, El Salvador, Liberia and Peru.

law as stipulated in the UNCLOS and have been opposed by States.⁹⁶ It could be argued that these claims to 200M are in fact divergent practice as opposed to either establishing a new norm or breaches of international law. Divergent practice has been held to be a breach of international law in the *Nicaragua* case.⁹⁷ This would mean that Somalia is in breach of the UNCLOS Art 57 as the limit set there for a territorial sea is 200M. The court however, seems to have given itself some leeway in its decision by adopting the use of the word 'generally' which would indicate that there are some times when state conduct is not a breach of a rule but is practice that has either been accepted by some states as being valid or is a developing custom. At one point in time the Latin American States almost uniformly claimed a 200M territorial sea and this action gave rise to a regional custom that may not be universally accepted.⁹⁸ As indicated above the concept of a regional custom is disputed and was raised in the *Asylum* case where the existence of such a custom was challenged by the court as,

‘The court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only...’⁹⁹

The Organisation of African Unity, (OAU), encouraged African States to claim a 200M territorial sea as part of the process of protecting security and economic development of African States¹⁰⁰ with the hope of developing regional stability and strength, unfortunately the adoption of the a uniform territorial sea did not

⁹⁶ At p73.

⁹⁷ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (1986) I.C.J. Reports 14.

⁹⁸ Thirlway, above n 93 at p94. This regional custom existed between 1945 and 1960.

⁹⁹ *Columbian-Peruvian asylum (Colombia v Peru)* (1950), above n 90 at pp277-8.

¹⁰⁰ Nasila Rembe *A Study of the Contribution of the African States to the Third United Nations Conference on the Law of the Sea* (Sijthoff & Noordhoff, Alphen aan den Rijn, 1980) citing OAU (CM/RES 250 Art 2(extend sovereignty from territorial sea up to limits of continental shelf)

occur.¹⁰¹ Somalia's claim to 200M territorial sea is compromised by the fact that it is unable to effectively police the zone. Part of the rationale behind the claim for a territorial sea was based on effective control over sovereign territory, including the sea zones.¹⁰²

This state of uncertainty then brings into question the current ability of Somalia to exercise its jurisdiction over the alleged illegal fishing vessels operating off its coast. It has been held that this confusion over the limits of Somalia's jurisdiction has created the possibility that the HS extend to the Somali coast.¹⁰³ The uncertainty is further clouded by Somaliland Fishery Law No 24 of 27 November 1995.¹⁰⁴ This legislation addresses the inconsistencies between the UNCLOS and Somali Law No 37. Somaliland law is in the process of being updated so that Art 2 of the Somaliland Constitution,¹⁰⁵ which defines maritime zones, is in harmony with the UNCLOS. The process also recognises the impossibility of the concept of a 200M territorial sea due to the closeness of the Yemen. The intention is to align the three main zones with Djibouti and Yemen bringing them back to 12M territorial sea, 24M contiguous zone and 200M EEZ until agreement is reached with Yemen and a new boundary delimited. Art 2 of the Constitution states that the EEZ will be at its minimum 11M and at its maximum 30M. Until the agreement is reached with Yemen on boundaries, the boundary will be a median point drawn from the baselines used by each State to determine its territorial sea. The process of delimitation is further repeated in Art 2 of Fishery Law No 24. The effectiveness of this law remains to be seen as Somaliland while having claimed independence, as discussed in Chapter 2, that has not been recognised, Somalia is still seen as the State. As stated in the section on the continental shelf

¹⁰¹ At p94. Had this occurred there would be grounds for arguing that Somalia's claim to 200M territorial sea was part of the regional custom.

¹⁰² Rothwell and Stephens, above n 97 at p73.

¹⁰³ Jack Lang *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia S/2011/30* (United Nations 2011) at Annex1 p30 paragraph [89] where it was declared that Somalia was deprived of both a territorial sea and an exclusive economic zone. There is however, no supporting reasoning as to why this should be so.

¹⁰⁴ Somaliland Fishery Law No 24.

¹⁰⁵ Constitution of the Republic of Somaliland (adopted 30 April 2000).

the recent lodging of a claim by Somalia would also include the waters around Somaliland and be attributable to Somalia.

Seeking to gain some clarity over the maritime zones of Somalia, the international maritime Organisation, (IMO), has produced a table of existing maritime laws relevant to security and maritime enforcement.¹⁰⁶ This table identifies eleven pieces of legislation, of which seven are identified as being in force, of which two are applicable to Somaliland and three to Puntland. The status of the remaining pieces of legislation is described as being unclear. There is no authority for the legitimacy of these pieces of legislation apart from the fact that participants in a maritime law enforcement workshop mentioned them.

The UN has taken a different perspective by authorising states to enter Somalian territorial seas through the use of Security Council resolutions. The TFG, UN Security Council and navies operating as part of counter piracy operations subscribe to a 12M territorial sea.¹⁰⁷ The action by the UN, and accepted by navies operating in the area, indicates that there is a strong possibility that the UN accepts Somalia has, not a 200M territorial sea, but a 200M EEZ. This then allows for the freedom of navigation, as codified under Art 87(1) the UNCLOS, through the EEZ by other states including the navies of States involved in anti piracy operations. This also allows for the pursuit of pirates within the zone as if they were on the HS. The pursuit of fishing vessels may be continued into the HS from the territorial sea of Somalia in accord with Art 111(2) the UNCLOS, and this right may also be applied to illegal fishing vessels where the vessel is suspected of breaching Art 58(3) the UNCLOS, and the duty to follow the laws and regulations of the coastal State under Art 111(1). The power to visit and

¹⁰⁶ "Table of Somali Laws Relevant to Maritime Law Enforcement (prepared on 18 March 2013)" (2013)

www.imo.org/search/results.aspx?k=table%20of%20Somali520Laws%20Relevant%20to%20Maritime%20Law%20Enforcement. While some of the documents are readily accessible, others particularly those relating to Puntland, are only available in Somali.

¹⁰⁷ J Ashley Roach "Countering Piracy off the Coast of Somalia" 2010 104 A. J. I. L. at p402.

board a vessel is conferred on states when operating within the EEZ under Art 110 the UNCLOS, however, this right is limited to piracy or specifically where the vessel is without nationality which may apply in cases of illegal fishing if vessels are trying to avoid recognition, (Art 110(d)). If the area claimed by Somalia as its territorial sea is treated by the UN as a territorial sea then this limits the rights of visit and boarding of vessels and the jurisdiction of Somalia applies and only its vessels may operate to police its laws and regulations within the territorial sea. The coastal State may, in a territorial sea, prevent the infringement of fisheries laws and regulations, as these are a breach of the right of innocent passage granted under Art 19 the UNCLOS.

While acknowledging the existence of Somalian jurisdiction over a band of maritime waters that could be classed as territorial seas the UN has avoided any direct reference to territorial seas and instead used the somewhat vague term 'territorial waters' that lacks any legal consequence or definition.¹⁰⁸ The use of the term has effectively sidestepped the discussion over whether there is any claim by Somalia to territorial waters and the breadth of the sea over which Somalia has jurisdiction. It could be implied that the UN was acknowledging that under UNCLOS, Somalia has an inherent right to a territorial sea, it was just the boundaries that were in dispute. This lack of clarity does not make the matter any easier for the naval vessels operating in the waters around Somalia as there is no clear specification as to the point at which they should obtain authorisation to enter Somalia's territorial waters, is it the 12M boundary under UNCLOS or at the outer limits of the 200M territorial sea as claimed by Somalia?

¹⁰⁸ *United Nations Security Council Resolution SC Res.1816, S/RES/1816 (2008) SC 9344* (entry into sovereign waters to interdict pirates), Security council authorises States to use land based operations in Somalia as part of the fight against piracy off the coast, unanimously adopting *United Nations Security Council Resolution SC Res.1851, S/RES/1851 (2008) SC/9541* (allows incursion into sovereign waters of Somalia as well as authorising incursions onto land.), preamble, Background, Art 3, art 7(a) and (b). Statements made by Indonesia recognised that the resolution applied only within the territorial waters of Somalia, Libya acknowledged that the resolution applied within the territorial waters and jurisdiction of Somalia thereby acknowledging that the area was under the local jurisdiction of Somalia.

As mentioned earlier, the Lang report suggests that Somalia is deprived of a territorial sea and an EEZ.¹⁰⁹ However, Somalia is entitled to a minimum of a 3M territorial sea as this was the minimum claimed by Somalia in its modern history.¹¹⁰ The claims by the Lang report seems in opposition to the earlier claim that Somalia had jurisdiction over territorial waters and in the absence of any other claims to maritime zones by Somalia the HS have been extended to the coast of Somalia. This would mean that the currently alleged illegal fishing could be conducted by any state to the same boundaries. Any fishing by foreign vessels would consequently not be illegal. This cannot be the case, because until 1991 Somalia was licensing foreign vessels to fish in its waters.¹¹¹ Either the Somali government was operating a large-scale fraud based on fraudulent licences or both parties accepted that Somalia was exercising its rights obtained under the UNCLOS within its territorial waters. A later UN report suggests that there is still some legal ambiguity around the status of Somalia's waters.¹¹² The Lang report focuses on the legal issues surrounding piracy off the coast of Somalia, while the second report looks specifically at the protection of the natural resources of Somalia including its fish stock and the allegations of illegal fishing.

It is important to note that the resolution to the territorial sea problem will only come about when Somalia's elected constitutional government has made application to delimit its EEZ and a continental shelf.¹¹³ There has been neither an adoption of these limits nor a change in the national legislation. Once these procedural matters have been resolved then a territorial sea and an EEZ can be defined in limits that accord with the UNCLOS. To this end, action has been started by Somalia against Kenya in an effort to solve a dispute over the sea

¹⁰⁹ Lang, above n 103.

¹¹⁰ Churchill and Lowe, above n 93 at p81.

¹¹¹ Arky, above n 27 at p2.

¹¹² *Report of the Secretary-General on the Protection of Somali Natural Resources and Waters S/2011/661* (2011).

¹¹³ Somalia has submitted a claim for a continental shelf with the assistance of Norway.

boundaries between the two states.¹¹⁴ In the interim, it is possible to argue that Somalia's territorial sea extends out to the 12M limit as allowed under the UNCLOS. The court of first instance in *Salad*¹¹⁵ identified that Somalia has ratified the UNCLOS, although there may be some doubt about the ratification as it was concluded in 1994.¹¹⁶ UNCLOS supersedes national law and it is the duty of ratifying States to bring national law into conformity with the treaty. The court also identified that UNCLOS can be accepted as CIL as it has been ratified and consistently acted on by the majority of States, some 162 to date, excluding the US. The case could only be considered informative in its application outside the boundaries of the US. While the 12M limit, is not the default position as to the distance of a territorial sea, Somalia has previously legitimately claimed a 12M territorial sea.¹¹⁷ Prior then, to its claim for a territorial sea of 200M, it is possible to assert that there was a desire to extend the jurisdiction of Somalia out to 12M. It could be argued that the territorial sea of Somalia that complies with both CIL and the UNCLOS is 12M.

¹¹⁴ International Court of Justice "Somalia institutes proceedings against Kenya with regard to "a dispute concerning maritime delimitation in the Indian Ocean" No 2014/27" (press release, 28 August 2014).

¹¹⁵ *U.S. v Salad*, above n 89, a US case with regard to suspected pirates who were captured some 400M from Somalia's coast after murdering four victims some 40M off the coast of Somalia. The defence argued that the acts took place within the territory of Somalia and that the US lacked authorisation for the extraterritorial application of two sections, murder under 18 U.S.C.A §1111 where the offence occurred within the special maritime and territorial jurisdiction of the United States and firearms offences under §924 which relates to the illegal possession of firearms.

¹¹⁶ *Report of the Secretary-General on the Protection of Somali Natural Resources and Waters*, above n 112 at p7. At the time of the ratification Somalia was without an effective government.

¹¹⁷ *Rembe*, above n 101 at p 92.

12 Responses to illegal fishing

12.1 Somalia's response to illegal fishers.

As has been stated, Somalia is a state with ineffective government and therefore lacks the ability to make either, State-to-State representations regarding the illegal fishing or to make representations to international organisations that will be acknowledged as coming from the State of Somalia. This however, has not stopped organisations within Somalia making representations to the Italian Foreign Minister in 1992 seeking to have illegal fishing stopped. Further appeals have been made to the Arab League, EU, OAU and UN in 1995, all seeking assistance in closing down illegal fishing.¹¹⁸

12.2 Regional responses within Somalia

All three regions of Somalia, Puntland, Somaliland and the TFG, (south western area), have responded in much the same way to the incidents of illegal fishing off their coasts. Since 1991 each region has employed private security companies, (PSCs, discussed later in Chapter 5), to assist in policing regional fisheries.¹¹⁹ The benefits or otherwise of employing PSCs have been debated and the benefits generally outweigh the deficits.¹²⁰ Benefits range from the infusion of external skills, technology and resources, to fill a legitimate un-met need due to lack of capability, through to allowing weaker bodies to protect natural resources or provide public goods that would not otherwise be provided.¹²¹ They also provide access to international networks that are beyond the ability of poorer States to access.¹²² On the other side of the ledger, PSCs inhibit the development of the relevant resources by the employing body and can also damage the relationship

¹¹⁸ Bawumia and Sumaila, above n 13 at p2.

¹¹⁹ Hansen, above n 41 at p565.

¹²⁰ At p586 citing M Small "Privatisation of Security and Military Functions in Africa" Accord Occasional Paper 1(2) (2006).

¹²¹ At p586.

¹²² At p586.

with national people, as being employed they can operate outside democratic control.¹²³

The TFG has had several attempts at employing PSCs to provide maritime security. Since 2005 two companies have been employed, Top Cat and Northbridge, with varying results.¹²⁴ The major stumbling block for both of these organisations was their inability to arrange sufficient finance, either through their own resources, or through the TFG access to foreign funding.¹²⁵ In the end neither of these two companies have provided the much-needed security for maritime resources.¹²⁶

Puntland has tried various PSCs to protect the resource rich waters off its coast, Hart Security, Somalia Canadian Coast Guard, SOMCAN and Al Habibi Marine Services. Hart Security was employed with consistently good results in the early stage of its employment.¹²⁷ The major issue facing both Hart Security and Puntland, was the legal status of the security company should it apprehend vessels fishing illegally. Puntland is not recognised as a State at international law. Any action by Hart in exercising aspects of its contract related to detention of illegal fishing vessels could be viewed as piracy or sea robbery depending where the actions took place.¹²⁸ Hart detained a Spanish fishing vessel the *Albacora Quatro* off the Puntland Coast. The owners of the vessel challenged the legality of the action. The matter was settled through international arbitration.

Art 110 of UNCLOS confers a 'right of visit' on warships where there are reasonable grounds for suspecting that a vessel is engaged in one or more of a

¹²³ Hansen, above n 41 at p586.

¹²⁴ At pp591-4.

¹²⁵ At pp591-4.

¹²⁶ At p587.

¹²⁷ At p587.

¹²⁸ At p 587.

limited number of activities.¹²⁹ There is no ‘right of visit’ on the HS for vessels that are not warships or for vessels believed to be illegally fishing. There is under Art 73 a right to board a vessel within the EEZ in the exercise of the State’s sovereign right to conserve and manage the living resources. Art 96 confers immunity from jurisdiction on States other than the flag State if on non-commercial government service. The vessels used by Hart could be perceived to be on commercial service due to the existence of the contract between Hart and Puntland.

Somali Law No 23 covers the jurisdiction of Somalian waters and empowers the Navy under Art 13 as the only legitimate body authorised to enforce the law. Hart was not contracted by Somalia to replace its navy, so the actions in detaining vessels would not be authorised.

It has been suggested that, as in the case of pirates from Somalia, that the PSCs might be able to claim to be operating as privateers.¹³⁰ The Hague Convention of 1907¹³¹ Chapter VII Arts 1-8 clarified this practice. Traditionally letters of marque and reprisal were issued by the government of the day.¹³² Letters of marque were issued to private vessels, known as privateers, in time of war to bolster naval capacity.¹³³ The letter of marque granted the right to board a vessel and recover cargos previously taken from the boarding vessel, as long as the vessel boarded was either involved in the original theft or from the same port.¹³⁴ The vessels recovering cargo were either allowed to keep the property obtained

¹²⁹ Art 110 specifies piracy, slave trade, unauthorised broadcasting, the vessel is without nationality or maybe flying a foreign flag but is of the same nationality as the warship.

¹³⁰ Bawumia and Sumaila, above n 13 at p1. James Brown *Pirates and Privateers: Managing the Indian Ocean's Private Security Boom* (Lowy Institute for International Policy, Sydney, 2012) at p8.

¹³¹ Hague Convention of 1907 (opened for signature 18 October 1907 entered into force 1910)

¹³² Theodore Richard “Reconsidering the Letter of Marque: Utilising Private Security Providers Against Piracy” 2010 39 Pub. Cont. L. J. at p415.

¹³³ K Sorenson *State Failure on the High Seas - Reviewing the Somali Piracy* (Swedish Defence Agency, Stockholm, 2008) at p26.

¹³⁴ At p27.

or were to share it with the sovereign.¹³⁵ The use of letters of marque and privateers started as two separate practices. Overtime the boundaries became blurred and they became indistinct from each other.¹³⁶ The blurring of the practices was compounded when they were employed at times outside a state of war being declared as they were used to disrupt the trade of competitors, particularly between Britain and France.¹³⁷ The sovereign originally issued letters of marque, over time the practice degenerated and those of lesser rank, including despot State governors, mid level military officers and Latin American revolutionaries also started using them.¹³⁸ The main users of both letters of marque and privateers agreed in 1856 in the Paris Declaration to outlaw their use.¹³⁹ There is no scope for Hart to claim that they were acting as privateers, as Britain was a signatory to the Paris Declaration, and if the Hart vessels were registered under the British flag, then Art 1 of the Paris Declaration would bind them.

Puntland also employed both SOMCAN and Al Habibi Marine Services. Both of these organisations were not as successful as Hart. In the case of SOMCAN, it was a clan-based organisation supported by the then President, Yusuf,¹⁴⁰ and when the presidency changed in 2008, SOMCAN lost its support. This was further hampered by their attempts to fund their operations by using licensing fees; this became nothing more than a protection racket.¹⁴¹ Al Habibi signed a contract with Puntland in 2005 that lasted until 2008. Its success included a two-day period when it is reported that 13 vessels from Yemeni and Egypt were

¹³⁵ At p26.

¹³⁶ At p27

¹³⁷ Sorenson, above n 133 at p26.

¹³⁸ Eugene Kontorovich "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation" 2004 45 Harv. Int'l L. J. 183 at p222.

¹³⁹ Declaration of Paris Respecting Maritime Law (signed 16 April 1856) Art 1 'Privateering is and remains abolished.'

¹⁴⁰ Hansen, above n 41 at p588.

¹⁴¹ Richard, above n 132 at p452.

apprehended for illegal fishing.¹⁴² Al Habibi's downfall was associated with allegations that its members had taken part in piracy.¹⁴³

Somaliland took a different approach to PSCs. Somaliland employed the services of Nordic Crisis Management, (NCM), not to carry out operational activities, but to develop security systems that complied with international standards set by the IMO and the UN.¹⁴⁴ NCM was funded through aid provided by the Norwegian Government so did not suffer from the same setbacks as the other companies.¹⁴⁵ NCM was also contracted to report on the feasibility of the development of a coastguard.¹⁴⁶

PSCs involved in establishing maritime security for Somalia and its regions have met a number of logistical problems that have reduced the effectiveness of the companies in supplying quality security for the fisheries off Somalia's coast and reducing the incidents of illegal fishing. The major legal hurdle is establishing the extent of legitimate authority that the PSCs have to act on behalf of non-sovereign entities in carrying out basic governmental tasks in the form of security over national fisheries. There has been significant discussion regarding the actions of pirates as to the possibility of their actions being sanctioned in a form similar to the privateers of old.¹⁴⁷ However, the Paris Declaration still stands as outlawing the practice.

¹⁴² Hansen, above n 41 at p590.

¹⁴³ Richard, above n132 at p415.

¹⁴⁴ Hansen, above n 41 at p594.

¹⁴⁵ At p594.

¹⁴⁶ Hansen, above n 41 at p594.

¹⁴⁷ Arky, above n 27 at p26 and Bawumia and Sumaila, above n 13 at p7.

12.3 International community's response to Somalia's problem of illegal fishing

While there may exist a number of measures at international law for the international community to directly assist Somalia in the protection of its fisheries there is no clear and concerted policy enunciated through the UN directing member States to increase their efforts to utilise the measures stated below. The closest that any international body has come to assisting Somalia is in the mandate given to European Union Naval Force, (EU NAVFOR), which calls for vessels to the '...monitoring of fishing activities off the coast of Somalia.'¹⁴⁸ There have been instances where pirates have detained fishing vessels for illegal fishing, but when released there has been no follow up activity by the European authorities.¹⁴⁹

It has been suggested that the main reason behind this apparent lack of activity is associated with the general lack of political will and the hesitancy to become involved in the affairs of another state.¹⁵⁰ It is not suggested that other states actively patrol the coast of Somalia on behalf of the Somalian government, rather that the measures made available under the UNCLOS, FSA, RFMO and other treaties and agreements that focus on duties and responsibilities of flag States and port States are put into practice to minimise their State's involvement with illegal fishing and consequently make it harder for illegal fishers to continue their business.

¹⁴⁸ EU NAVFOR Mandate <eunavfor.eu/mission/>

¹⁴⁹ "Is the EU protecting illegal fishing vessels in Somalia waters?" *The Business Daily* (18 September 2010) The fishing vessel Alakrana was detained by pirates in 2009 and after several attempts by the Spanish Army to release the hostages, was finally released on the payment of USD4million.

¹⁵⁰ Cantrell, above n 57 at p400.

Art 56(2) of the UNCLOS constrains the coastal State in exercising its rights to have regard to the rights and duties of other States and to be compatible with provisions of the Convention.

Art 58(3) requires other States when exercising their rights and performing their duties within the EEZ to have regard to the rights and duties of the coastal State and requires them to comply with the laws and regulations adopted by the coastal State in accord with the convention and international law.

UNCLOS Art 62(4) directs nationals of other States who fish within the EEZ to comply with conservation measures and with the laws and regulations of the coastal State, with specific mention made of licensing (4)(a), quotas (4)(b), equipment and seasonal regulation (4)(c), the size and age of fish to be caught (4)(d), the reporting of catch and effort statistics, and vessel position reports (4)(e), the placement of observers on vessels by the coastal states (4)(g), and the landing of catch by licensed vessels in ports of the coastal State (4)(h) and lastly enforcement procedures (4)(k).

Art 64 of the UNCLOS creates the responsibility for coastal States and other states whose national's fish in the region for highly migratory fish species to cooperate to ensure the conservation of those fish species and to promote optimum utilisation of such species throughout the region, both within and outside EEZs of those states.

The control of fishing vessels is vested in the responsibilities outlined under Art 94 of the UNCLOS that stipulates the responsibility to exercise jurisdiction and control over vessels flying a State's flag, Art 94(1) and Art 94(5) that requires the observance of international regulations procedures and practices, and to take

necessary steps to ensure their observance. Under the UNCLOS Art 94(6) flag States are required to investigate if it is reported to them by another State that one of their vessels is not under proper jurisdiction and effective control. The standard for effective control is the due diligence requirement, which requires a higher standard where the activity involves greater risk, it is suggested that high risk exists where there is limited control over natural resources,¹⁵¹ such as exists off the Coast of Somalia. Due diligence requires not only having the legislation in place at a national level but also requires enforcement of that legislation. If there was a consistent practice of breaches of coastal State laws by a vessel it would be arguable that the flag State was not exerting its best efforts and in doing so, was falling short of the requirement for effective control of vessels flying its flag. The precautionary principle, discussed fully in Chapter 4, supports the duty to control lawfulness of the fishing activities of vessels flying the flag of a State.

Owners intent on illegal fishing easily thwart these responsibilities as they seek out states that are particularly lax in meeting their obligations under this article.¹⁵² The FSA and the Compliance Agreement specify flag State duties that are widely accepted and so would form part of the generally accepted international regulations, procedures and practices. Art 58(2) applies Art 94(1) to the EEZ.

Art 5 FSA assigns responsibility of the flag State to be concurrent with coastal States.

¹⁵¹ *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* I.C.J. Reports at paragraph 197

'An obligation to act with due diligence in respect of activities which take place under the jurisdiction and control of each party. It is an obligation, which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party... would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction.

¹⁵² Cantrell, above n 57 at p384.

Under the FSA Arts 18 and 19 establish both duties of the flag State and the compliance and enforcement requirements of a flag State. Art 18(1) ensures compliance with regional and sub-regional conservation and management measures by vessels flying the State flag and that the vessels do not act to undermine effectiveness of such measures. Art 18(2) limits issuance of licences to cases where the State can effectively exercise its responsibilities under the UNCLOS and FSA towards its vessels. Art 18(3) stipulates a range of measures to be taken with regards vessels flying its flag including establishment of regulations, the prohibition on fishing on the high seas unless licensed, to ensure that vessels do not conduct unauthorised fishing within areas controlled by other States, the establishment of records of vessels licensed to fish on the high seas, and the appropriate marking of vessels and gear. Other requirements include reporting of catch and vessel position, verification of the catch, monitoring, control and surveillance of fishing vessels. FSA Art 19 requires that States ensure compliance with regional and sub-regional conservation and management measures, investigation of alleged violations of regional and sub-regional conservation and management measures, the provision of information from the vessel to investigating authorities and if sufficient evidence warrants, passing on to appropriate authorities evidence with a view to instituting proceedings.

Articles 34 -50 of the FAO IPOA-IUU cover flag State responsibilities. These cover fishing vessel registrations, Arts 34-41, records of fishing vessels, Arts 42-42 and authorisations to fish, Arts 43-50.

Under the Code of Conduct Arts 8.1 assigns duties to all States, 8.2 flag State duties are assigned and Art 8.3 assigns port State duties. This is as, has been stated earlier, a voluntary code with limited uptake.

The matter of obligations of flag States and their liabilities for IUU fishing and violation of coastal State law is currently under discussion at ITLOS as the result of a request from the Sub-Regional Fisheries Commission for an advisory opinion.¹⁵³

The UN, through its agencies the UN Development Programme, (UNDP), United Nations Environment Programme, (UNEP), and the Special Envoy to Somalia over a period of ten years from 1998-2008 became aware of the problem of illegal fishing and still there was no mention of the problem in any Security Council Resolutions focussed on stopping piracy.¹⁵⁴ It was not until 2011 and UNSCR 2020 that any kind of directive for States to investigate illegal fishing was mentioned.¹⁵⁵

12.3.1 Is Piracy a legitimate response to illegal fishing?

The shortest answer to this question is no. However, this fails to examine the needs of those who are deprived, not only of the protection afforded by a functioning State over the access to territorial fish stocks, but also of the very fish stocks themselves by those who would seek to take maximum advantage of the lack of enforcement brought about by the lack of effective government. The lack of protection forced the local fishermen to take matters into their own hands, arming themselves and acting as vigilantes by confronting illegal fishing fleets and demanding some form of compensation for the taking of fish stocks.¹⁵⁶ Some fishermen recognised that piracy was not the best approach due to the negative consequences; however, they accepted that these consequences might highlight

¹⁵³ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (9 April 2013)* ITLOS Case No 21.

¹⁵⁴ Kontorovich, above n 138 at p21.

¹⁵⁵ *United Nations Security Council Resolution SC Res 2020 6663 S/RES/2020 (2011)* operative paragraph 24, where States are urged to *positively consider* investigating allegations of illegal fishing. (Author emphasis added).

¹⁵⁶ Anderson, above n 5 at p 327.

the inequity of the situation regarding illegal fishers.¹⁵⁷ Cronji supports this view, arguing that vigilantism is the action of citizens taking the law into their own hands as a result of the failure of state structures to maintain the supply of security.¹⁵⁸ This conflict over the fish stocks, while possibly legally indefensible, highlights the wider global conflict between the haves and the have nots, in the sense that the local fishers are seeking to survive, while the illegal fishers are seeking to advance their economic status, albeit at the expense of those less able to defend themselves.¹⁵⁹ Anderson suggests that an illegal option chosen, due to a lack of legal alternatives, is unsupportable.¹⁶⁰

In an attempt to cloak their activities with some form of legitimacy and also to deceive the illegal fishers, several of the vigilante groups labelled themselves as Coast Guards.¹⁶¹ Cronji claims that the alleged pirates using this guise started attacking illegal fishing vessels in the early 1990s.¹⁶² As an aid to their legitimacy these groups gave themselves names like the 'Kismayo Volunteer Coast Guard', 'National Volunteer Coast Guard', or the 'Somali Marines'.¹⁶³ The contribution of illegal fishing to piracy and the expansion of piracy will be covered at greater depth in Chapter 5.

¹⁵⁷ Sone, above n 20 at p44.

¹⁵⁸ D Cronji "The Pirates of Somalia, Maritime Bandits or Warlords of the High Seas?" (Stellenboch University, 2009) at p53.

¹⁵⁹ Allison and Kelling, above n 39 at p329.

¹⁶⁰ Anderson, above n 5 at p354.

¹⁶¹ Cronji, above n 158 at p54.

¹⁶² At p55.

¹⁶³ Arky, above n 27 at p13.

13 Does the international community have a basis to assist Somalia to police its waters?

It would appear from the discussion on the international fishing framework above that there is sufficient scope for the international community to indirectly assist Somalia through the application of existing international treaties and agreements. If this is the case why has there been no concerted attention paid to the problem of illegal fishing off the coast of Somalia? It has been shown that cooperation amongst states in addressing the problem of illegal fishing has limited the impact of this menace to the conservation and replenishment of fish stocks.¹⁶⁴

It is important to understand the very nature of global fisheries to understand why the existing framework is failing. Fishing takes place in areas of the world that are beyond the gaze of national, regional and international bodies where the ability to effectively monitor and control those involved in the trade is severely limited by the sheer size of the area involved. It is also beyond the capability of one, or of many navies to effectively patrol such a vast area on a regular basis and to identify all the vessels involved. The pre-existing attitude where it was thought to be impossible to seriously diminish the availability of existing stocks still prevails to some extent today. This motivates those involved, both legal and illegal fishers, to catch as much as they can while they can and is even more prevalent where fish stocks are already heavily depleted. This has led to the 'tragedy of the commons' of the HS. This is perhaps brought about by the short-term focus on profit for today with little consideration given to the needs of an increasing global population for fish protein.¹⁶⁵

¹⁶⁴ Kevin Riddle "Illegal, Unreported and Unregulated Fishing: Is International Cooperation Contagious?" 2006 37 O.D. and I.L. at p 265.

¹⁶⁵ At p266.

Illegal fishing is still viewed more as a problem of conservation than one of criminality.¹⁶⁶ The political will to tackle the problem as one of criminality, in that the resources necessary to seek out and bring to justice the offenders, appears to be lacking. While Australia and New Zealand have developed specific legislation to control all aspects of fisheries and fisheries management¹⁶⁷ the cost of running these systems has seen them outsource some of the management and focus on more of the catch reporting and less on the patrolling and surveillance.¹⁶⁸ These systems are limited to apprehending those who are at the operational end of the illegal fishing regime, while those involved in the logistical and marketing segments of illegal fishing, the more transnational aspects, escape apprehension.¹⁶⁹ Both nations have attempted to control this end of the operation by requirements to have smaller portions of foreign ownership of companies involved in fishing.¹⁷⁰ The inability to pursue the major beneficiaries of illegal fishing is made easier by their ability to hide behind a corporate veil by registering their vessels to FOC States and utilising no more than a postal box address as the genuine link between the owner and the State. It also appears that fewer resources are invested in pursuing these criminals, who have created the illegal enterprise from the beginning, than is put into the discovery and apprehension of those at the operational end of the process.

FOC States are a major contributor to the ease of operation by illegal fishers. UNCLOS Art 94, mentioned above, establishes the obligations for flag States, yet does not create penalty provisions for those states that fail to meet their obligations. It could be argued that these states are in breach of the treaty yet it

¹⁶⁶ Gray, Legg and Andrews-Chouicha, above n 66 at p124.

¹⁶⁷ Gray, Legg and Andrews-Chouicha, above n 66 at p 124.

¹⁶⁸ *Saving Fish and Fishers: Towards Sustainable and Equitable Governance of the Global Fishing Sector*. (World Bank Agriculture and Rural Development., 2004) at p32.

¹⁶⁹ Stokke and Vidas, above n 9 at p22.

¹⁷⁰ Ignacio Escobar "The Development and Enforcement of National Plans of Action: The Spanish Case" in Kathleen Gray (ed) *Fish Piracy: Combating Illegal, Unreported and Unregulated Fishing* (OECD, 2004) at p343. Riddle, above n 164 at p274 lists a sample of vessels prosecuted by the U.S., but there is no mention of subsequent prosecution action against the FOC for allowing vessels flying their flag to breach agreements.

is impossible to locate one state brought to account for its failure to meet its obligations under the UNCLOS. The only time there is any mention of a flag State is when there is an attempt by an organisation to have a vessel released after being apprehended for illegal fishing and the setting of a bond for the vessel is raised. Then the flag State is called in to seek release of the vessel.

Cooperation amongst East African States to target illegal fishing has been proposed along the same lines as the Maritime Organisation for West and Central Africa, (MOWCA), that came into being in 1975 and met in 2006 to focus its attention on illegal fishing as a threat to maritime security. There is within the network a commitment to cooperatively manage port and vessel security along with safety of navigation and environmental protection.¹⁷¹ The East African States have responded in similar fashion with the creation of the Djibouti Code of Conduct in 2009, however its focus is primarily on anti-piracy actions than a much broader spectrum to include illegal fishing.¹⁷² It could be said that the blanket use of the term maritime security operations could include illegal fishing patrols over large areas of coastline, however, the East African States involved in signing the code are not well endowed with naval or coast guard resources that may be able to conduct extended patrols to limit illegal fishing.¹⁷³ Like many other agreements though this one is not legally binding and at the time of signing only nine States had agreed to its implementation.¹⁷⁴

Arts 8(3) and 8(4) of the FSA apply to vessels of flag States fishing on the HS, where conservation measures adopted by the RFMOs apply. The two articles give effect to the FSA's otherwise general duty to co-operate by becoming a member of the RFMO or by applying the measures in question. These measures seem to

¹⁷¹ James Kraska and Brian Wilson "Maritime Piracy in East Africa" 2009 62(2) J. Int'l Aff. at p62.

¹⁷² J Kraska and B Wilson "Combating Pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard." 2009 52(10) Ocean and Coastal Management at p4.

¹⁷³ At p5.

¹⁷⁴ At p4.

be quite ineffective as three of the most common offenders for illegal fishing off the coast of Somalia, France, Spain and Indonesia are all members of the FSA.

Art 21 of the FSA specifies enforcement measures that can be taken to monitor the vessels fishing in a regional or sub-regional area. These include a right to board and inspect vessels flying the flag of a party to the FSA, whether or not that vessel is a party to or a member of the regional or sub-regional agreement.

This right to board is a further expansion of the right granted under Art 110 UNCLOS that limits the right to board to naval vessels. Under the FSA the right to board is not limited to naval vessels, but is conditional on the inspection taking place by an authorised inspector. The rights of the boarding party are limited to gathering evidence and do not extend as far as the rights associated with Art 73 the UNCLOS which empowers, within the EEZ, the right of arrest of the vessel. Under Art 21 FSA any evidence of illegality or overfishing or fishing without a licence can only be reported to the flag State, which retains the prosecutorial right over its sovereign vessels. This level of control was argued for by the flag States as a means of protecting the reach of their sovereignty.¹⁷⁵ This right under Art 21 could well empower those involved in the naval operations in the GOA or the Indian Ocean seeking out pirates, to inspect fishing vessels in the area off Somalia's coast and in doing so protect the fish stocks of Somalia. This would be conditional on having authorised inspectors on board and the naval vessels belonged to State parties to the FSA.

Art 23 FSA creates a set of measures to be utilised by port States to police the conservation and management measures of the regional and sub-regional bodies. These measures extend to inspection of documents, fishing gear, and catch when vessels are voluntary in port. While other port State measures have existed since

¹⁷⁵ Cantrell, above n 57 at p393.

1978, including the Paris Memorandum of understanding,¹⁷⁶ these measures have been directed at vessel safety. The port State measures under this article are focussed specifically on fishing. The power exists under this article to prohibit landings and transshipment of catch where it has been established that the catch has been taken in a manner that under mines the effectiveness of regional or sub-regional conservation and management measures.¹⁷⁷ The downside of these measures however, is that it may force vessels to seek out Ports of Convenience, (POC),¹⁷⁸ or to tranship the illegal catch at sea and mix it with legitimate catch and thus evade the control measures or by utilising a differently flagged vessels to which the catch has been transhipped or the illegal vessel changing flags before arrival at port.¹⁷⁹

Art 24 FSA requires states to take cognizance of the special needs of developing States in relation to the conservation and management of straddling and migratory fish stocks. While the general thrust of this article is in relation to assisting developing States to establish fisheries with the assistance of the, UNDP and other similar organisations, Art 24 (2)(B) highlights the need to avoid adverse impacts on and ensure access to, fisheries by small scale and artisanal fishers. It is these small scale and artisanal fishers who are the very ones directly affected by the action of the illegal fishers and the inaction of the international community in assisting in policing the coastal waters off Somalia. It is not suggested that states should operate in the sovereign zones of Somalia to apprehend illegal fishers, it is suggested that part of assisting with conservation of the valuable fishing resource could be undertaken by the application of political will to the implementation of port State controls. This would reduce the benefits of illegal fishing to those who consistently infringe Art 25(3)(c) which covers assistance to developing States specifically in the area of monitoring,

¹⁷⁶ Paris Memorandum of Understanding, (adopted 2 December 1980).

¹⁷⁷ FSA Art 23(3).

¹⁷⁸ Allison and Kelling, above n 39 at p29.

¹⁷⁹ Allison and Keeling, above n 39 at p28.

control and surveillance, compliance and enforcement, adding further strength to the duty outlined in Art 24.

One of the main drawbacks of RFMO is the length of time that it takes to make any sort of decision as the bodies only meet once every 12 months and reaching agreement can be a process drawn out over several years.¹⁸⁰ This problem of glacial decision making is further compounded by the fact that not even all members adhere to the conservation and management measures, nor fulfil their responsibilities as flag States.¹⁸¹

It should be possible for RFMO to establish a set of preconditions for those wanting to become members, for example, displaying a willingness to exercise its responsibilities as a flag State, having national fisheries legislation in place that follows the aims of conservation and management measures of the RFMO the state wishes to join, have developed and implemented a National POA-IUU and be displaying active anti-IUU measures within its own jurisdiction. While this may be counter to the concept of getting as many States in as possible, by making conditions for joining or remaining a member quite stringent it will add some backbone to the organisation and indicate to global members and the international community that the process or protection of the fisheries resource for future generations is taken seriously.

In line with the above suggestion RFMO could develop a series of enforcement measures for States that are members and fail to meet their existing obligations in any of the major areas of contention, particularly, FOC and PSC. If PSC measures are breached and a vessel is impounded currently the port State is required to send information to the flag State for further action. This leaves the

¹⁸⁰ Stokke and Vidas, above n 9 at p26.

¹⁸¹ At p28.

FOC States the ability to take no further action and the illegal fishers to continue with their business with little or no impediment. Granting the right on joining an RFMO to port States to institute legal proceedings against illegal fishers from different State parties or flag States, while certainly contentious, would further reinforce the concept that food security globally is taken seriously. Those states that join the RFMO would be required to agree to the condition, that in this area only, they would need to be willing to surrender their sovereignty. While it is acknowledged that there are currently POC that might take the vessels unwilling to take the risk of being prosecuted, it will narrow the field as to where illegal fishers can tranship their stocks and combined with trade measures against those states that harbour POC, will limit the effectiveness of these POC. While member States are able to flout the existing regime it downgrades the effectiveness of the agreements and the conservation and management measures.

It has been estimated that the global cost of piracy is anywhere between USD16Billion - USD18Billion annually.¹⁸² The benefit to pirates is in the region of USD120Million per year.¹⁸³ The costs to both Puntland and South Central Somalia of establishing effective coast guards through the use of PSC were estimated at between USD60 – USD75 Million per year. It can be seen that if some form of tax were established, in a legitimate sense, through the IMB or the maritime industry, that covered the costs of developing a functioning coast guard, this would reduce the necessity of Somali fishermen to resort to piracy, protect the artisanal fishers from illegal foreign fishing fleets, provide both income and jobs for those dependent on the sea for a living and start to reduce the incidents of piracy on both fishing vessels and commercial vessels plying the waters off the coast of Somalia. The long-term benefit for Somalia is that its fishery would be protected and the potential would exist to re-develop an estimated USD15Million

¹⁸² *Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities Off the Horn of Africa* (World Bank, 2013).

¹⁸³ Paul Salopek "Off the lawless coast of Somalia, questions of who is pirating who" *Chicago Tribune* (Chicago, 10 October 2008.)

fishing industry.¹⁸⁴ The protection of the industry might not enable the figure to be reached immediately as fish stocks will need time to recover, however, in the longer term the recovery could well enable the taxes raised by the IMB or maritime industry to be repaid. It could be argued that in essence the tax is little more than protection money by another name, however, unlike the ransoms paid to the pirates the tax will avoid the wastage associated with ransoms that end up in warlords pockets and be utilised to assist in bringing Somalia out of years of poverty in a much more peaceful manner.

While the possibility of States signing up to soft law approaches to the control of illegal fishing has come to an end and the time to add stronger set of measures to this problem has arrived. Soft law approaches, FAO IPOA-IUU being one, may have been an inducement to sign up to less onerous conditions to control illegal fishing. The scale of illegal fishing internationally is so large and detrimental to conservation measures that try to protect fish species from extinction, that any measure that allows states to opt out or diminish their commitments no longer has a part to play in the international framework. The parties that opt out of agreements and float outside effective regulation are amongst the biggest barriers to the effective management of regional and HS fisheries.¹⁸⁵ The problems of overfishing and illegal fishing have grown beyond the resources of states and regional bodies to effectively control. It is suggested that the future of global fish stocks is dependent on greater levels of global cooperation and a willingness to sacrifice short-term financial gain for long term sustainability. While it is not suggested that the '*pacta tertiis*' rule be overturned, it is suggested that higher international bodies are brought to bear to cover areas traditionally seen as the commons. It has been the failure of states to willingly curtail the excesses of national fishing fleets that has assisted in the depletion of fish stocks. Unfortunately the price to pay for a lack of self-control is external regulation.

¹⁸⁴ Sone, above n 20 at p15 versus the estimated USD94 Million taken by illegal fishers, or the USD300 Million suggested by Tharoor, above n 14.

¹⁸⁵ Kevin Bray *A Global Review of Illegal, Unreported and Unregulated (IUU) Fishing* (Australian Government in Cooperation with the FAO, Sydney, Australia, 2000) at p2.

This does not in any way diminish the sovereign right of a State to establish its own fishing laws to cover territorial waters under its jurisdiction, it creates a set of conditions, should the fishing vessels of a state wish to enjoy the benefits of long term access to globally shared fish stocks.

14 Conclusion

Somalia is the author of its own downfall in relation to illegal fishing by failing to clearly establish the limits of its territorial sea in compliance with the UNCLOS and define the extent of its EEZ. This is however, a matter of relative simplicity for the newly elected constitutional government, should they wish to protect the ability of traditional fishers and the nascent fishing industry, of submitting documentation to the UN that declares the extent of these zones.

Illegal fishing is not just a problem for Somalia but also a worldwide problem that is increasing as fish stocks diminish. While there is a raft of regulation to limit illegal fishing, the number of loopholes that exist in the various agreements still allows illegal fishers to operate with relative impunity. Unless there is a significant change in attitude by states that assist those parties involved by not implementing their obligations and duties under the various agreements, this problem will continue until the last fish is caught.

While responses of the regions of Somalia to the practice of illegal fishing have displayed a level of concern about the fisheries it falls on the government to take the necessary steps to actively seek funding for establishing an effective coast guard to patrol the extensive coastline.

It is perhaps the global community who needs to take some responsibility for the poor response to this issue. International attention was attracted to the problem when local fishers attempted to protect not only their income, but also their access to life saving quantities of protein, by resorting to piracy. By failing to live

up to the obligations and duties many of the European nations have agreed to, under the fisheries framework, they have created some of the conditions that have fed the practice of illegal fishing off the coast of Somalia which has in turn fed the piracy problem.

Chapter 4

Hazardous Waste Dumping in Somali Waters.

I am the Horn of Africa
 Nations are crossing my Borders
 They are dumping nuclear waste
 Into my beautiful waters
 (Helwaa)¹

Introduction

Somalia has been a target of waste dumping since the late 1980s.² The dumping has occurred in the waters off the coast and in many places throughout the country. Somalia has been described as the one of the three largest waste dumps in the world.³ It has been alleged that some of this waste has been transported to Somalia by the Ndrangheta mafia of Italy as part of a trade in guns and waste deal.⁴ In the early 1990s investigations carried out by an Italian television journalist revealed the trade, however she was assassinated before the full complexity of the trade could be exposed.⁵ The full extent of the dumping did not become apparent until after the 2004 tsunami that washed rusting containers on to the northern beaches of Somalia.⁶ These containers leaked a mix of toxic ooze that caused a range of health problems from mouth bleeds to unusual skin disorders to breathing issues and cancers.⁷

As a response to these reported deaths the United Nations Environmental Programme, (UNEP), carried out an investigation that lead them to believe that

¹ Cachia, above Chapter 1 n 1.

² Chris Milton "Somalia Used as Toxic Dumping Ground" (2009) <http://www.theecologist.org/News/news_analysis/268581/somalia_used_as_toxic_dumping_ground.html> 12.

³ J Pina "Poor Countries - the North's Radioactive Dump" (2001) Rom; at p1.

⁴ At p1.

⁵ Peter Eichstadt *Pirate State: Inside Somalia's Terrorism at Sea.* (Lawrence Hill Books, Chicago, 2010) at p40.

⁶ See Hari, above Chapter 3 n 15.

⁷ Milton, above n2.

the issue raised two important points. The dumping was in violation of treaties covering hazardous waste dumping and secondly that it was questionable that a legitimate contract to dump waste could be signed during a time of civil war when the government was factionalised and unable to oversee the efficient and environmentally sound disposal of waste.⁸ The UNEP report further went to identify why Somalia is a waste disposal site. The reasons identified in the UNEP were, political instability, the availability of dumping sites and the lack of public awareness about environmental issues as the people were too busy trying to eke out a living amidst poverty and extreme social problems caused by the internal conflict.⁹

The first attempt at toxic waste dumping in Africa was recorded as occurring in 1980 when the US tried to deposit waste in Sierra Leone for an alleged sum of \$24 Million.¹⁰ The cost differential at the time was \$250 per ton in the US, as against \$40 per ton in Africa.¹¹ This highlights the profit motive of those involved in this most toxic of activities.¹² An example of the manner in which Africa is used as a dumping ground, is that of a local farmer in Nigeria who agreed to the use of his backyard at US\$100 per month for the dumping of hazardous waste by an Italian company. Told that the waste was fertilizer, later examination of the chemical, after it had leaked out of the drums onto his land, revealed that it contained polychlorinated biphenyls (PCBs) and asbestos.¹³ The list of materials that dumped since that time has included non-nuclear industrial waste and uranium wastes from the US and chemical and industrial waste from Italy.¹⁴ International traders in waste have been able to benefit substantially from the North/South movement of waste that is too difficult, too expensive, or too toxic

⁸ UNEP "United Nations Rapid Environmental Desk Assessment" 2005 at p133.

⁹ At page p135.

¹⁰ B Logan "An Assessment of the Environmental and Economic Implications of Toxic Waste Disposal in Sub-Saharan Africa" 1991 25(1) J. W. Tat p63.

¹¹ Jennifer Clapp "The Illicit Trades in Hazardous Wastes and CFCs: International Responses to Environmental "Bads"" in H. Friman and Peter Andreas (eds) *Illicit Global Economy & State Power* (Rowman & Littlefield Publishers Inc., Maryland, 1999) at p106.

¹² Jennifer Clapp "NGOs and the International Toxic-Waste Disposal in Sub-Saharan Africa" 1994 3(17) *Journal of Environment and Development* at p17.

¹³ *New African*, 253, October 1988 p22.

¹⁴ Filomina Steady *Environmental Justice in the New Millenium: Global Perspectives on Race, Ethnicity and Human Rights* (Palgrave MacMillan, New York, 2009) at p53.

to process efficiently in the countries of origin.¹⁵ The recognition that the true costs of disposal, needed to avoid the cost of harming human and animal health and the long-term damage to the soil and to drinking water, need to be met by the disposer.¹⁶ This waste has brought with it, not financial benefits as promised by the traders, or a source of resources much needed by the developing nations, but instead disease, impoverishment, misery, and in some cases, death. The argument that waste transfer brings access to otherwise unavailable resources has been criticised by Cheyne who suggests that the benefits of even legitimate dumping or transfer of industrial waste are extremely doubtful.¹⁷ One of the arguments used to justify such dumping is that African countries have spare assimilative capacity, a notion that flies in the face of the precautionary principle and the polluter pays principle widely used in Multilateral Environmental Agreements (MEAs).¹⁸

It has been estimated that 90 per cent of all hazardous waste is generated by the developed world and that 98 per cent of that figure is generated by the Organisation for Economic Co-operation and Development, (OECD), countries. Most of the trade in hazardous waste is between industrialised, OECD countries, who have adopted similar standards for treating the waste. At least 20 per cent of the trade is between the OECD and developing countries.¹⁹ The tightening of the hazardous waste regime in the developed world and the desire for waste to be treated within the country of generation, has stimulated a trade in hazardous waste across borders and, perhaps more perniciously, from the developed to the developing world.²⁰ The stringent controls placed on the movements of hazardous waste have generated a significant illicit trade as disposers seek to lower their costs and generate higher profits.²¹ Various figures have been quoted

¹⁵ At p59.

¹⁶ Ilona Cheyne "Africa and the International Trade in Hazardous Wastes" 1994 6 A.J.I.C.L 493 at p496. The 'polluter pays' principle discussed below.

¹⁷ At p496.

¹⁸ At p495. Assimilative capacity is the ability of a state to absorb the waste before it reaches levels classified as pollution.

¹⁹ Clapp, above n 12 at p19.

²⁰ Clapp, above n 11 at p106.

²¹ At p106.

for the difference in disposal rates between the developed world, \$3000 per tonne and the developing world, \$2.50 per tonne, depending on the type of waste and the nature of its hazardous content.²² The volumes of illicit trade are hard to estimate as the majority of it occurs outside the awareness of government bodies²³ and, not surprisingly, by criminal organisations that actively work to defeat surveillance of their activities.²⁴

The trade in hazardous waste is an outward sign of the continuing push for limitless economic growth desired by the developed world, which leads to the creation at both international and national levels of social and economic inequality based on race and class.²⁵ This inequality has negative human rights consequences.²⁶ The desire for growth is a continuation of a pattern of domination of the global South by the global North that has its genesis in the colonial and imperialistic exploitation of natural resources and labour of the South.²⁷

This inequality at state level is reinforced by environmental racism, the process of apportioning the burdens of environmental degradation.²⁸ Environmental racism also covers a much wider perspective of racial discrimination in environmental policies, laws and practices with the attendant concepts of human rights issues, injustice, social inequality and disproportionality. However, it is more overt than that. The former governor of the World Bank commented that,

‘I think the economic logic behind dumping a load of toxic waste in the lowest-wage country is impeccable and we should face up to that.’²⁹

²² Logan, above n 10 at p64.

²³ Clapp, above n11, p96. Logan, above n10 at p64 suggests that the financial benefits of the trade and costs associated with it are hard to determine due to its furtive nature.

²⁴ At p97. Don Liddick “The Traffic in Garbage and Hazardous Wastes: an overview” 2010 13 Trends Organ Crim 134 at p136.

²⁵ Steady, above n 14 at p5.

²⁶ At p53

²⁷ At p6. Clapp, above n 12 at p23.

²⁸ At p53.

²⁹ “Let Them Eat Pollution” Economist (London, England, February 8 1992)

He was perhaps echoing a belief held by many in the developed world. This last comment while evidencing some economic logic certainly indicates that there is an element of expendability, the concept that some races are more expendable in the pursuit of profit than others are.³⁰

Overwhelmingly the burden of both environmental racism and expendability has been borne by African communities as a continuation of the process of neo-colonisation conducted by multinational corporations. Instead of removing resources, the neo-colonisers are exporting to African nations waste that is causing long terms effects through environmental degradation and toxic pollution.³¹ Africa has become a focus of these exports due to weak environmental laws, pollution control agencies lacking in manpower, lack of technical skills and adequate facilities and insufficient legal support.³² Lax custom controls and over importations of hazardous waste, compounded by the need for foreign exchange to counter the effects of poverty, famine, and war, have fuelled the importing of waste.³³ Logan suggests that for it to be classified as a trade there to be some form of exchange of goods,³⁴ he argues that the 'trade' is only transactional. Logan bases this on the fact that African nations are only supplying a lease of their ground for a specified purpose. This could be in perpetuity as the damage caused by the toxic pollutants may not be able to be remediated.³⁵ Logan appears to base his interpretation of trade on a very simplistic formula where one set of goods is exchanged for another. There is a concept of trade that involves swapping money for service, in this case the lease of land. It is therefore possible to argue that the 'trade' is in fact a trade.

It is the purpose of this chapter to highlight the existing hazardous waste treaties established either prior to the collapse of the Barre government or brought into being since that time and analyse whether or not these treaties could have

³⁰ Steady, above n 14 at p48.

³¹ Steady, above n 14 at p6.

³² Roberto Sanchez "International Trade in Hazardous Wastes: A Global Problem with Uneven Consequences for the Third World" 1994 3 *Journal of Environmental Development* 139 at p140.

³³ Clapp, above n 12 at p19.

³⁴ Logan, above n 10 at p72.

³⁵ At p72.

provided sufficient protection for Somalia's environment. This analysis will focus on the obligations of states to oversee and regulate the movement of hazardous waste and the controls that should be in place to prevent the transfer of waste to vulnerable states like Somalia. If there are gaps in the legislation or conventions suggestions are made as to, how these can be improved to prevent the traffic in waste to states of the South. Somalia's inability to protect its environment has been directly affected by its lack of effective government. It is postulated that the strength of international conventions and agreements should be robust enough to protect the most vulnerable of the international community.

15 Are Somalia's waters protected by International hazardous waste conventions?

It doesn't take long to locate hazardous waste dumping conventions that would have been, and still are, applicable to Somalia's situation. These range from The United Nations Convention on the Law of the Sea through to the Basel Convention and on to the most relevant, the London Dumping Convention and its Protocol. The breadth of these agreements should offer plenty of scope to protect the waters off Somalia's coast from the dumping of waste, carried out by legitimate businesses and by illegal operators.

15.1 UNCLOS

Somalia ratified the UNCLOS and is entitled to the protection this convention offers.³⁶ The power of the convention lies with individual States creating their own domestic law derived from the various articles of the UNCLOS.³⁷ UNCLOS is not an MEA, as its primary function is to regulate access to the oceans for States as well as to provide rules for their use. One of the areas covered is that of environmental protection broadly covered under Part XII Article 192 that provides a general obligation for parties to protect and preserve the marine environment.³⁸ This general obligation is further reinforced by Art 194, which outlines measures necessary to prevent, reduce and control pollution including the minimisation of the release of toxic, harmful, or noxious substances through dumping.³⁹ This indicates that there is an obligation not only on coastal States, but also on flag States to prevent vessels, which fall under their control or jurisdiction, from carrying out dumping that is not allowed under the conventions discussed below.

³⁶ UNCLOS, above Chapter 3, at n 47.

³⁷ UNCLOS Art 210.

³⁸ UNCLOS Art 192.

³⁹ UNCLOS Art 194(3)(a).

Pollution is defined under Art 1(4) of the UNCLOS as,

‘The introduction into the marine environment by man of any substance that results in, or is likely to result in, harmful effects on living resources and marine life and causes hazards to human health. Dumping is defined as the deliberate disposal of wastes or other matter from vessels.’⁴⁰

From the foregoing it can be seen that the focus is on prevention and reduction of harm as opposed to creating mechanisms whereby harm that is caused can be cleaned up and the victim compensated along with a punitive regime for the agent or agents responsible for the harm.⁴¹

Any action taken to prevent and reduce harm is guided by the precautionary principle, which despite its omission from the UNCLOS is relevant to the interpretation of Arts 192 and 194 through the subsequent practice of States.⁴² The precautionary principle or approach comes out of the Declaration of the Second International North Sea Conference on the Protection of the North Sea and is based on the German Law of *Vorsorgeprinzip*.⁴³ The core characteristic of the precautionary approach (PA) is that there is a lack of scientific proof, a lack of full scientific certainty about the impact of the activity on the environment.⁴⁴ In operation, the PA takes two approaches to dealing with uncertainty, either the evidentiary presumption or burden of proof.⁴⁵ When the PA is applied to dumping, the allowable dumping of waste is placed under some form of control

⁴⁰ UNCLOS Art 5(a)(i).

⁴¹ Patricia Birnie, Alan Boyle and Catherine Redgwell *International Law & the Environment* (3rd ed, Oxford University Press, Oxford, 2009) at p383.

⁴² Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement in the 1974 Nuclear Tests Case, (Weeramantry Dissenting Opinion) pp288, 342 ICJ Reports; 106 ILR, pp1,64, where the principle is described as gaining increasing support as part of the international law of the environment.

⁴³ David Freestone and Ellen Hey *The Precautionary Principle and International Law: The Challenge of Implementation*. (Kluwer Law International, Boston, 1996) at p4

⁴⁴ Simon Marr *The Precautionary Principle in the Law of the Sea* (Martinus Nijhoff, The Hague: New York, 2003) at p9.

⁴⁵ At p15. Here he notes these take several forms, from an obligation to conduct environmental impact assessments (EIAs) through to the requirement to produce evidence that the activity is not harmful and including the banning of an activity until scientific certainty exists, pp. 15 – 16. The burden of proof assumes that human action is harmful and therefore activities are regulated before harm occurs or as discussed above an EIA is sufficient. P17.

to limit the dumping, even though science may not be able to prove a causal link between the substance and pollution.⁴⁶ The Oslo Convention of 1972, which was the leading dumping convention at the time, provides is an example of this.⁴⁷ The PA suggests that the protection of the environment can be achieved through less of the 'assimilate and disperse' approach,⁴⁸ to one of elimination, minimisation, and containment,⁴⁹ where the focus is on reuse, recycle or treatment of waste, before dumping occurs.⁵⁰ The PA is stated clearly in the Rio Declaration on Environment and Development Principle 15,

'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'⁵¹

The precautionary approach adopts the philosophy that positive action may be required in advance of science providing sufficient proof that harm may or may not be caused.

Another means of implementing the precautionary approach is the suggestion that environmental impact assessments (EIAs) take place before the dumping of hazardous waste as opposed to after to avoid the possible occurrence of negative environmental effects.⁵²

EIAs, articulated in Art 206 of the UNCLOS, are the process of assessing the impact the proposed dumping of hazardous waste will have and is. The process of assessing the impact on the environment before any dumping suggests that if

⁴⁶ Freestone and Hey, above n 43 at p5.

⁴⁷ Oslo Convention, (opened for signature 29 December 1972, effective 30 August 1975), 1046 UNTS 120. (9323 UNTS 3 11ILM, 262 (1972). This convention is confined to the North Atlantic.

⁴⁸ 'Assimilate and disperse' is where the sea was viewed as being able to take all the waste dumped into it without effecting its levels of pollution

⁴⁹ Birnie, Boyle and Redgwell, above n 41 at p138.

⁵⁰ Marr, above n 44 at p123. The recycling, reusing or treatment are conditional on not causing undue risk to human health or disproportionate cost.

⁵¹ Rio Declaration on Environment and Development, (Rio De Janeiro, 3 -14 June 1992) United Nations Conference on Environment and Development (UNCED).

⁵² Birnie, Boyle, and Redgwell, above n 41 at p383.

the negative effects are too significant that the dumping will not be sanctioned. If there is insufficient evidence to confirm that the effects are minor then the PA would suggest that dumping either does not happen or the onus is on the State wishing to carry out the dumping to prove that the effects are minor. EIAs occur when the effects of transboundary pollution could be significant as opposed to minor or transitory. An obligation to carry out an EIA arises once the threshold of foreseeability is met. Birnie et al argue that it be carried out before or as part of any planning process, not once science reveals that harm is foreseeable.⁵³ The requirement under Art 206, which requires the assessment of potential effects of planned activities that may cause substantial pollution or significant and harmful changes to the marine environment by States who become aware of these proposed activities in areas under their jurisdiction or control and to report the results in accord with Art 205. This requirement to conduct an EIA is found in the Basel Convention Art 4(2)(f) which requires information regarding proposed movements of transboundary waste be notified to States concerning the effects of the movement on human health and the environment.⁵⁴

The precautionary approach was approved by the ICJ in the Pulp Mills Case (Argentina v Uruguay) Advisory Opinion No17:

‘...prima facie an obligation to conduct an EIA and to show no harm would result to the marine environment; there exists international support for the precautionary principle and the concept of inter-generational equity. Further support for the notion that states should not cause or permit serious damage in accord with Principle 21 of the Stockholm Declaration 1972 ‘.⁵⁵

⁵³ Birnie, Boyle, and Redgwell, above n 41 at p171.

⁵⁴ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (opened for signature 22 March 1989, entered into force 5 May 1992).

⁵⁵ Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) I.C.J. Reports p83 at paragraph 204. Where the courts stated,

‘ In this sense, the obligation to protect and preserve, under Art 41 (a) of the Statute has to be interpreted in accordance with practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial

This decision, and the decision in ITLOS Advisory Opinion No 17, provides clear guidance that the PA is evolving as CIL.⁵⁶

Art 210 deals directly with pollution by dumping and establishes, (1) that States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment, (2) that other measures maybe taken as necessary to address pollution, (3) that dumping is not carried out without competent permission of states, and (4) that global rules and regulations, standards, practices and procedures, such as the London Dumping Convention 1972 and the London Protocol 1996, should be endeavoured to be established. Lastly it identifies that dumping within the territorial sea, EEZ and on the Continental shelf of a State shall not be carried out without prior approval of the coastal State and that the national laws, regulations and measures are no less effective in the prevention, reduction and control of pollution than the global rules and standards. A fine reading of Art 210 suggests that there is an acceptance that pollution will occur by the inclusion of the terms, both 'reduce' and 'control' following the direction to 'prevent'. The standards for national rules on reduction, prevention, and control of pollution are to be no less effective than those found in global rules and standards,⁵⁷ such as the London Dumping Convention⁵⁸ (LDC). A measure of the control available to Somalia,⁵⁹ is available by the inclusion of the requirement that national laws and regulations will ensure that dumping is not carried out unless permission has been granted by

activity may have significant adverse impact in a transboundary context, in particular, on a shared resource.'

⁵⁶ Responsibilities and Obligations of States Sponsoring Person and Entities with Respect to Activities in the Area. (Advisory Opinion No 17 1 November 2011) paragraph 135;

The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.'

The tribunal then went on to say,

'...the obligation to apply a precautionary approach as reflected in Principle 15 of the Rio Declaration and set out in the Nodules Regulations and the Sulphides Regulations; this obligation is also to be considered an integral part of the due diligence obligations of the sponsoring State and applicable beyond the scope of the two Regulations.'

⁵⁷ UNCLOS Art 201(6).

⁵⁸ London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Material and Their Disposal (opened for signature on 29 December 1972 entered into force 30 August 1975).

⁵⁹ UNCLOS above Chapter 3, at n 47.

competent authorities of the State.⁶⁰ This would preclude dumping off the coast of Somalia, as there is no effective government to give that permission. This permission is known as prior informed consent (PIC) and forms a central part of the principles of hazardous waste management under MEAs.⁶¹ Prior informed consent is the process whereby the importing State is notified by the exporting State of the impending export or import of waste. The importing State needs to supply its consent to the exporting State before exports can start. There is also a requirement that there is confirmation of the contract between exporter and disposer and that the disposal will take place in an environmentally sound manner. Kummer argues that the requirement of PIC is evolving into CIL.⁶² There is an obligation on States to exercise due diligence with regard to activities within their territories and under their control. It is debatable as to whether this extends to the exporting State in the case of transboundary hazardous waste movement.⁶³ The requirement that States under Art 210(1) establish laws and regulations to prevent, reduce and control marine pollution and Art 210(3), which requires that the laws so established ensure that dumping is not carried out without permission of the importing State. It must follow that there is an obligation to carry out checks on the regulations and the competency of the processes involved. This would of itself generate a requirement of checking that the documentation at both ends of the process is genuine and gives rise to an exercise of due diligence. This permission was given to an Italian company to dump waste off the coast of Somalia. The permission granted by a former member of the Barre government.⁶⁴ It would be hard to argue that under Art 210 3) a former member of government is a 'competent authority of the state' even if there was domestic legislation empowering a government official to issue the relevant consent.⁶⁵ To support the argument that a 'former' Government Minister

⁶⁰ UNCLOS Art(3).

⁶¹ Marr, above n 44 at p14.

⁶² Katherine Kummer *International Management of Hazardous Wastes* (Clarendon Press, Oxford, 1995) at p21.

⁶³ At p20.

⁶⁴ "Toxic Waste Adds to Somalia's Woes" *New Scientist* (19 September 1992) at p5.

⁶⁵ Competent authorities of state include those ministries and officials with legally delegated or invested authority capacity or power to perform a designated function.

still retained the authority to issue the consent it would have to be argued that the collapsed government of Said Barre was still the duly elected official government of Somalia. That, that government lacks effectiveness, would not remove the fact that it was still the government of the day. The official in this case was a member of the government of Ali Mahdi Mohammed, a warlord who had taken part in the ousting of the Said Barre government. The foregoing example surely provides sufficient proof that if an obligation exists to exercise due diligence, then in this case, it was not exercised by the exporting State. Further Art 210(5) requires that due consideration be given to other states which, by their geographic situation, may be adversely affected by the dumping.⁶⁶ It has been stated that the issue of dumping toxic waste off the coast of Somalia is of concern to other States as the affects flow out to other south-eastern states due to current flows.⁶⁷ These affects include waste uranium which poisons the fish stocks that other countries, like Kenya to Somalia's south, rely on as part of the protein supply and export trade.⁶⁸ Somalia has been unable to create the necessary domestic legislation to regulate dumping within its territorial waters. Had it been able to create the legislation it is highly unlikely that the necessary resources to police its substantial coastline, to interdict those vessels that dump waste within the territorial waters of Somalia, would have been available. This suggests that due to the nature of Somalia as a State without effective government, it is incapable of complying with its international law obligations.

The inclusion of port States and flag States under Art 216, and Art 218, suggest that there are measures that could have been taken before the vessels that carried out the dumping arrived in the territorial waters of Somalia. These include flag States ensuring that their vessels abide by the applicable international rules and standards to prevent, reduce, and control hazardous waste dumping. Enforcement is the responsibility of either the coastal State, if the dumping occurs within its territorial waters, or the flag State or to the State

⁶⁶ UNCLOS Art 210(5).

⁶⁷ Saeed Shabazz "Somali Piracy Connected to Toxic Dumping, Illegal Fishing" (2008) at p1.

⁶⁸ Sitawa Kimuna "Hazardous Waste Transfer to Africa: Implications for the Poor and Marginalised" 2004 7(1) Sustainable Communities Review at p50.

in which the waste is loaded, (Art 217(1)(a), (b) or (c)). As has been discussed in the previous chapter, flag States labelled, as FOC are loath to enforce measures on vessels flying their flag. The measures applied to port States, Art 218, relate more to information coming to hand regarding dumping that has occurred and grant the port State the right to carry out investigations.⁶⁹ These investigations can be related to dumping that has occurred outside the internal waters, territorial sea, or EEZ of a foreign State. For dumping that has occurred within those aforementioned zones, a request is required from the State that has suffered the damage. In the case of Somalia, this is particularly restrictive, as the government and its maritime ministry were not functioning at the time of the alleged dumping. The measures granted under Art 218 do not however extend to a port State from which a vessel is departing with a toxic cargo that is destined be dumped at sea or within the territory of another state. In this instance, Art 216 would be of benefit as it covers under Art 216(1)(c) the loading of wastes within a states territory or its off shore terminals. Under Art 218(3) a flag State may request of a port State that it investigates a discharge by a vessel outside the internal waters, territorial sea or EEZ of the port State irrespective of where the discharge occurred. While the definition of dumping contained in the UNCLOS Art 1(a)(i) and (ii) is quite specific regarding the exclusion of waste discharged from a vessel in its normal operations. Art 1(b)(i) covers wastes or other matter transported by or to vessels operating for the purpose of the disposal or treatment of those wastes or other matter on such vessels. This would then suggest that the discharging of any waste or matter, not in the normal course of operation of the vessel, falls within the 'dumping' definition and as such Art 218 could be said to cover discharge of waste from vessels other than in the normal course of operation.⁷⁰ The obligation then falls on the flag State to pursue known incidents of discharging waste wherever it occurs.⁷¹

⁶⁹ UNCLOS Art 218(1).

⁷⁰ Shabtai Rosenne and Alexander Yankov *United Nations law of the Sea, Commentary, Articles 192-278* (Martinus Nijhoff, Dordrecht, 1990); at p271. There is no particular meaning attached to discharging.

⁷¹ See the discussion above in Chapter 3 regarding the reluctance by flag States, and particularly FOC States, to investigate incidents in relation to vessels flying their flags.

Somalia would have appeared to breach the requirement to develop national laws under Art 210(1) of UNCLOS along with Art 210(2) that requires States to take measures to prevent, reduce and control pollution by its failure to provide an efficient either Coast Guard or Navy to police its waters. Somalia would also be in breach of Art 216(1)(a) for its failure to enforce the international rules and standards with regard dumping in its territorial sea, EEZ, or continental shelf along with breaches of Art 220(3).

Those parties that allowed vessels to dump waste without the consent of a competent authority and prior approval of the coastal state committed breaches of Art 210(3). Port States are in breach of Art 210(1)(c) for failure to enforce the same international standards and rules against vessels loading hazardous waste at their ports where prerequisite permits and consents have not obtained. Port States would also be in breach for their failure under Art 218(1) for their failure to institute proceedings where evidence suggests that there has been dumping of waste outside the territorial sea or EEZ of the port State. Flag States of vessels involved in dumping are in breach of Art 216(1)(b) for their failure to enforce applicable international rules and standards against vessels flying their flags. Flag States would be in breach of Art 217(1) for their failure to provide effective enforcement of international rules and standards.

15.2 London Dumping Convention 1972 and Protocols 1996.

The London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972⁷² (LDC) came into being as a result of the UN Conference on the Human Environment (June 1972) Stockholm. Somalia,⁷³ is not a signatory to the LDC and is not a signatory to the 1996 Protocol to the Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matter 1972⁷⁴ (Protocol). The LDC represents the international standards referred to in Art 210 of the UNCLOS, and is therefore binding on Somalia and binding on other parties that may be operating in Somali waters. The focus of the LDC is articulated in Art 1 as being the prevention of pollution of the sea from dumping of wastes that causes a hazard to human health, living resources, and marine life. The waste stream is divided into three separate categories, Art 4(1)(a) material that is prohibited from being dumped, Art 4(1)(b), material that requires a special permit to be dumped and Art 4(1)(c), material that requires a general permit to be dumped. The material that is classified under Art 4(1)(a) is clearly set out in Annex 1 and material mentioned in Art 4(1)(b) is listed in Annex II. Annex I includes mercury and cadmium, persistent plastics, crude oil and its distillates, radioactive material and materials used for biological and chemical warfare. Annex II consists of several chemical compounds such as copper lead, nickel, zinc etc., and scrap metal. Dumping is defined under Art 3(1)(a) as being the process of deliberate disposal at sea of wastes or other matter from vessels... at sea. Annex I materials are prohibited from being dumped. Annex II material may only be dumped under a special permit issued under Article 4(1)(b) for Annex II materials and any other waste under Art 4(1)(c). Art 6(1)(c) requires the parties to keep records of the nature and quantities of matter permitted to be dumped and the location, time and method

⁷² London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Material and Their Disposal (opened for signature on 29 December 1972 entered into force 30 August 1975 above n56.

⁷³ *Report of the Secretary-General on the Protection of Somali Natural Resources and Waters*, above Chapter 3, n 112 at p18 paragraph 69

⁷⁴ 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972.

of dumping. Art 6(2) requires contracting parties to issue prior special or general permits by the appropriate authority for matter loaded in its territory and intended for dumping or for matter intended for dumping but loaded on a vessel registered in its territory, when the loading occurs in the territory of a State not a party to the LDC.

Article 7 covers the application of the LDC to all vessels registered to a contracting party. Art 7(1)(a), vessels loading matter that is to be dumped, Art 7(1)(b), and vessels under its jurisdiction believed to be engaged in dumping Art 7(1)(c). Art 7(2) requires parties to take within their territory appropriate measures to prevent and punish conduct in contravention of the convention.

The LDC was followed by the Protocol. The Protocol was developed under the LDC and is supportive of Art 210 of the UNCLOS, which requires states to cooperate on a global or regional basis in the formulation of international rules and standards and recommended practices and procedures for the protection and preservation of the marine environment. The Protocol was designed to modernise the LDC and will ultimately replace it. The Protocol entered into force in 2006.⁷⁵ To date Somalia is not a signatory to the Protocols. 87 parties including the France, Germany, Italy, Japan, People's Republic of China, UK, and the US, have signed the Protocol. The Protocol reflects the global shift towards precaution and prevention in relation to hazardous waste management and as such it could be argued that the Protocol forms part of CIL⁷⁶ and is therefore binding on Somalia. CIL is a possible by product of treaties which are binding only on contracting parties but set out to establish, not restrictive practices, but to have a general effect.⁷⁷ While the general rule is that non-parties to a treaty are not bound by its terms,⁷⁸ where treaties reflect rules of CIL then non-parties are bound.⁷⁹ The changes to the LDC brought by the Protocols are noticeable under

⁷⁵ www.imo.org/About/Conventions/ListOfConventions/Pages/Convention-on-the-Prevention-of-Marine-Pollution-by-Dumping-of-Wastes-and-Other-Matter.aspx

⁷⁶ Thirlway, above Chapter 3 n 93.

⁷⁷ Shaw, above Chapter 2, n 65 at p95.

⁷⁸ North Seas Continental Shelf (Federal Republic Germany/Denmark)(Federal Republic of Germany/Netherlands)(Judgment) [1969] ICJ Reports [41 ILR29] at pp3, 25.

⁷⁹ Shaw, above Chapter 2, n 65 at p95.

Art 4(1)(1) where the emphasis is now on a total prohibition of dumping except for some non-organic material as classified under Annex I. Matter that is allowed to be dumped has to comply with specific conditions as listed under Annex II which in general terms require the proposed material to go through an audit which is designed to ensure that the absolute minimum of waste is dumped and the bulk is either recycled in some form or disposed of through some other means excluding incineration at sea. These new procedures reversed the burden of proof on the bodies wishing to dump waste by ensuring material that was dumped was as innocuous as possible, a reversal of the LDC process.⁸⁰

Art 2 of the Protocol refers to the objectives being to 'eliminate pollution' and also under art 4(1)(1), mentioned above, where the term used is 'shall prohibit' indicating a strong command or duty for the prohibition to take place. Like the specific articles in the UNCLOS, there is in the LDC Art 6, that expects parties to 'not allow' the export of wastes or other matter to countries for dumping. The language used does not appear to be all that strong. A total prohibition or a 'ban' on material leaving a party's ports would perhaps serve a greater purpose than a seemingly mild 'not allow'. The Basel Convention, uses slightly stronger language under its general obligations Art 4(1)(b) where the term 'prohibit or not permit the export' is used which indicates a stronger inclination to stop waste leaving a party's ports or jurisdiction. The material that has ended up in the waters off the coast of Somalia had to start somewhere. It would be expected with the weight of prohibition and desire to stop the dumping of waste that these collected articles would ensure State parties were proactive in stopping waste leaving their ports unless sanctioned. Unfortunately with the lack of information available, as noted in the report to the Secretary-General of the UN, the security situation does not allow for a thorough investigation in Somalia to verify whether there has been illegal dumping.⁸¹ The Protocol codifies the precautionary principle, Art 3(1) and the polluter pays principle in Art 3(2).

⁸⁰ Birnie above n 41 at p189.

⁸¹ *Report of the Secretary-General on the Protection of Somali Natural Resources and Waters*, above Chapter 3, n 112 at p17 paragraph 63.

Art 9(1)(1) specifies that parties should designate an appropriate authority to issue permits. There is no direction as to what constitutes an appropriate authority, although it can be assumed that is more than likely a government official or branch of government with delegated powers to issue certificates on behalf of the government. In the case of waste dumped off the coast of Somalia there is a distinct lack of due diligence.⁸² In a similar vane is Art 10 (1)(1). Each party is to apply measures required to implement the protocol with respect to vessels registered in its territory and flying its flag. Article 10(1)(2) covers vessels loading in a contracting party's territory, wastes that are to be dumped or incinerated at sea. If vessels, that are either locally flagged or foreign flagged but loading waste in a port of a party to the protocols, leaves without complying with the requirement to have PIC to dump waste or any form of certification covering the waste then this is suggestive of a lack of thoroughness in the application of the Protocol and due diligence. It could also suggest that criminal groups are operating the waste dumping and are deliberately avoiding the constraints of the LDC and the Protocol for their own financial gain.

Art 12 of the Protocol suggests regional cooperation as a means of protecting the marine environment. The article promotes the adoption of agreements as a form of co-operation but does not specify any other steps that may be taken. A more specific and detailed article outlining specific active steps that could be taken which could involve joint naval/coastguard/police/customs operations, to interdict vessels suspected of dumping waste within the territory of party States would enhance this article and give more teeth to signatories to deter those who would actively avoid dumping restrictions. There is no suggestion that in the case of the inability of a State to conduct its own operations that others could work together to prevent dumping occurring in another states territory.

While Art 15 addresses the need to deal with responsibility and liability in accordance with international law regarding state responsibility for damage to the environment of other States, the undertaking to develop procedures

⁸² That the permits were issued by a 'former Minister' indicates a lack of thoroughness.

regarding liability arising from dumping has not apparently progressed and the matter is still to be addressed. This lack of ability to assign responsibility and liability, either to the flag State or a port State from impinges severely on Somalia's ability to seek compensation for those who have lost their life or for the damage caused to the environment through the dumping of waste. Although a designated liability regime under the Protocol has yet to be adopted, the general principles of state responsibility apply where a breach of international law can be identified.⁸³

One of the major weaknesses of the LDC is in the area of compliance control.⁸⁴ This weakness is due to the limited number of staff assigned to assess how well parties are implementing the convention.⁸⁵ This lack of auditing shows up in the poor reporting of dumping permits over a period of 18 years where half the parties failed to lodge reports.⁸⁶ The poor reporting could possibly indicate that parties do not see compliance with the convention, especially the reporting requirement under Art 5(4), as a major task. The last year for which figures are available, 2008, indicates that the trend has continued.⁸⁷ It is easy to assume that the lack of reporting and lack of follow up to ascertain the reasons behind the lack of reporting, could be of assistance to those States wanting to avoid regulation of their waste dumping.

Another area of concern is the lack of uptake of the convention by developing coastal States.⁸⁸ With regard to the African coastal States this could be due to the necessity of gaining income from developed States. The disposal of waste from developed States, as highlighted in the introduction, is seen as a source of income for the poorer non-OECD States. A 2001 investigation into waste dumping in

⁸³ Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty third Session, UN GAOR, 56 Sess, Supp No 10 UN Doc A/56/10 Y.I.L.C., (2001), vol.II (Part two) A/56/49(VolI)/Corr.4 Art 36 (1).

⁸⁴ Olav Stokke "Beyond Dumping? The Effectiveness of the London Convention" 1998 Yearbook of International Cooperation on Environment and Development 39 at p42.

⁸⁵ Stokke, above n 84 at p42.

⁸⁶ At p42.

⁸⁷ Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 and its 1996 Protocol, Final Report on Permits issued in 2008, LC-LP.1/Circ.52 (International Maritime Organisation, 2012).

⁸⁸ Stokke, above n 84 at p46.

Italy revealed that waste was transported from Italy, to Algeria, Ethiopia, Malawi, Mozambique Somalia and Zaire.⁸⁹

Somalia's lack of ratification of the Convention or Protocols should not prevent both flag States and port States who are signatories from enforcing their obligations by preventing either vessels flagged to them or vessels leaving their ports with an intention to dump waste. The indications are that at one time the political will existed to prevent maritime dumping. However the wording used in the Art 4(1) (a)-(c), that allows for recycling of waste or dumping of any waste at sea, even if permitted, speak of a mind set that still views the ocean as a dumping ground. An extensive prohibition on all dumping at sea, even of organic matter or biological material as permitted, would signal an alteration of that mindset.

The LDC imposes a prohibition on dumping unless it conforms to specific requirements that include permits for Annex II waste or general permits for other wastes outside Annex II. It would therefore follow if waste is dumped that falls within Annex I or without a permit then there has been a breach of Arts 4(1)(a) and 4(1)(b). Should there have not been a assessment by the State where the dumping is to occur then there would effectively be a breach of Art 4(2) that requires a prior study of the characteristics of the dumping site. Somalia would be in breach of Art 6(1)(a) for allowing dumping to occur without a permit, but only if one accepts that the LDC and Protocol reflect existing CIL. Other breaches would occur for port States for allowing matter to be loaded within its territory if there was no certificate issued for either specific dumping, Annex II waste or a general permit for other waste. Flag States would be in breach if loading took place on their vessels within non-party States without the prerequisite permits as mentioned above. Breaches would occur for both flag States and port States where there was a failure to ensure that measures were applied in accordance with the LDC under Art 7(1)(a) and (b) for port States. Further breaches would occur for failure to prevent and punish those parties that failed to take

⁸⁹ Pina, above n 3.

appropriate actions under Art 7(2). This would include Somalia as well as port and flag States from where vessels departed or carried the waste for dumping.

15.3 Basel Convention

Waste that has been discovered within the territorial waters of Somalia was not generated within Somalia but was allegedly generated in Europe.⁹⁰ This transfer of waste from Europe is covered under the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989 if the source State is a signatory to the Convention.⁹¹ Although Somalia has only recently ratified the Basel Convention on the 24th October 2010,⁹² Arts 6 (1) and 7 apply to the transit of hazardous waste through non-State parties. This would not preclude action being taken by Somalia against those who were carrying out the alleged dumping in the mid-1990s on the basis of general international law.

The Basel Convention was created out of a desire by the UNEP to establish a set of guidelines to control the transboundary movement of hazardous waste that resulted in the adoption of the 1982 Cairo Guidelines on Environmentally Sound Management of Hazardous Wastes.⁹³ The EC, the OECD states and the US established regulations regarding the transfer of waste across their borders, which were further amended by the EC and the OECD in 1986 to cover the export of waste to third countries.⁹⁴ The negotiations surrounding the establishment of the Basel Convention were centred on two major viewpoints. Those of the waste traders who wished the trade to remain a legal trade, as there were significant profits being made from the trade, and the view of the developing countries, particularly African that desired the trade to be banned outright as they were the recipients of this damaging trade.⁹⁵ Some of the African nations supported the trade as it was bringing to their shores much needed foreign currency.

The Basel Convention does not ban outright the trade in waste. Rather it develops some rules around that trade in an effort to protect developing nations from becoming the dumping ground for developed nations who are unable or

⁹⁰ Hari, above Chapter 3 n 16.

⁹¹ Birnie, Boyle and Redgwell, above n 53.

⁹² www.basel.int/countries/StatusofRatifications/Partiessignatories/tabid/1290/Default.aspx

⁹³ Clapp, above n 12 at p23.

⁹⁴ At p23.

⁹⁵ At p23.

unwilling to process their own waste within their territory.⁹⁶ The basis for the Basel Convention is a modified version of PIC. PIC is the sequencing of arrangements to cover the export and import of waste. In its basic form it covers a notification that a State wishes to export waste, a written response from the importing State, confirmation that a contract exists between exporter and disposer, that covers the terms of disposal in an environmentally sound manner, and an acknowledgement that if the trade is discovered to be illegal by one of the parties, then either the exporter will accept the waste back or the importer will dispose of it in an environmentally sound manner.⁹⁷ Article 4 establishes the basic obligations of the parties and also enshrines the PIC mentioned above. Art 4 grants the right to States to prohibit the import of hazardous waste for disposal. Art 4 stops the export of waste to States who have prohibited the import of wastes and does not allow for the export of waste to States who do not consent to the export. Art 4(2) establishes measures to be taken around hazardous waste from reduction in generation, (Art 4(2)(a)), creation of disposal facilities for environmentally sound management of hazardous waste,⁹⁸ (Art 4(2)(b)), directs measures to be taken by those handling hazardous waste to avoid pollution, (Art 4(2)(c)), that transboundary movement is reduced to a minimum, (Art 4(2)(d)), and to not allow the export of wastes to those States that have prohibited all imports of hazardous waste or to States where the waste may not be handled in accord with environmentally sound management practices. Of specific interest is Art 4(3) that considers that illegal traffic in waste is criminal and Art 4(5) that directs parties not to permit export to non-Parties. Art 4(7) places a prohibition on non-authorised persons from transporting or disposing of hazardous wastes and requires the labelling and packaging of waste in conformity with generally recognised international rules and standards and the requirement that documents accompany any transboundary movement from

⁹⁶ Clapp, above n 12 at p26.

⁹⁷ Basel Convention, Arts 6, 8, 9.

⁹⁸ Basel Convention, Art 2(8) defines environmentally sound management of hazardous waste as:

‘taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes.’

commencement of the journey to disposal point. Art 4(8) requires Parties that export hazardous waste to ensure that it is handled in an environmentally sound manner in the state of import or elsewhere. Art 6(1) requires the State of export to notify in writing the competent authority of any State through which there is a proposed transboundary movement of hazardous waste or waste.

Clapp alleges that the BC does not make this trade in wastes illegal; rather it attempts to regulate the trade.⁹⁹ The illegality of the trade is created under Art 9(1) and Art 9(5) of the convention, which supports the creation of domestic law to criminalise it.¹⁰⁰ As was stated earlier, Somalia has only recently ratified the Basel Convention; this does not stop the exporting State from prosecuting those who have breached the domestic legislation in illegally exporting waste to Somalia, and the exporting State itself is in breach for allowing the export. It is doubtful however that at this time there would be any tangible evidence left to identify the exporting State. The state of degradation of the containers of waste discovered post the 2004 tsunami indicates that the waste may have been from Swiss and Italian companies; however the assertion that the waste was dumped by the Ndrangheta mafia has not been fully supported by evidence to date.¹⁰¹ Clapp argues that the BC Secretariat and Interpol inefficiently pursue the trade in illegal waste while arguing that developing states view the criminalisation of the trade as an affront to their sovereignty, as decisions as to what they can and cannot import are made externally via treaty.¹⁰²

As mentioned above Art 6 requires the notification of any movement of waste to a competent authority and Art 7 applies that obligation to non-Parties. Birnie, et al argue that it is beyond argument that States are required to regulate and control activities that fall within their jurisdiction and control if they pose a risk

⁹⁹ Clapp above n 12 at p26. This failure to ban the trade in hazardous waste outright was in spite of the best efforts of the African states and developing states to achieve a total ban. This would suggest that the power of the lobby groups exceeded that of the African States and would possibly reinforce the neo-colonial view of Africa.

¹⁰⁰ Basel Convention, Art 9 (5).

¹⁰¹ Milton, above n 2

¹⁰² Clapp, above n 11 at p111.

of transboundary pollution or environmental harm.¹⁰³ The International Law Commission, (ILC), has declared that things under the jurisdiction and control of a State include ships therefore vessels dumping waste into the waters off Somalia fall within the 'jurisdiction and control' of an offending State.¹⁰⁴ The UN concluded in its report following the tsunami that a lack of ethical judgment was perhaps displayed by states that allowed companies to negotiate waste agreements with a factionalised government in the midst of a civil war without a functional and legal waste management system.¹⁰⁵ There was however, a lack of condemnation or a direction that those responsible are brought to justice for the breaches of the Basel Convention.

The Basel Convention is not, as has been stated above, an outright ban on the export of hazardous waste, although this was fought for strongly by developing nations, sustained lobbying from industrialised nations and waste trade groups defeated it.¹⁰⁶ The strength of the lobby can be seen in relation to the 1995 Ban Amendment to the Basel Convention. The Amendment is focussed on the prohibition of export and movement of, hazardous waste from OECD to non-OECD States. To date this amendment has not come into force, as sufficient members have not ratified it.¹⁰⁷ The lack of enforcement mechanisms and no clear definition of what 'environmentally sound manner' meant, left the developing states still feeling that they were vulnerable to exports from the developed world on the basis of profits for the traders.¹⁰⁸ The Basel Convention recognises that there will be hazardous waste generated by industrialised countries and that the convention is designed to cover the trade between these

¹⁰³ Birnie, Boyle and Redgwell, above n 41 at p143.

¹⁰⁴ Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal. (Opened for signature 10 December 1999, not yet in force), UNEP/CHW.1/WG/1/9/2

¹⁰⁵ UNEP-UNREDA, above n 8 at p134.

¹⁰⁶ Clapp, above n 11 at p102. Re-enforcing the point made above by Steady n 14 p53 above about the power of the lobbying groups and the lack of real political will to effectively deal with the management of waste within the borders of developed States. While there is not an outright ban there is a ban on exporting to non-party States.

¹⁰⁷ Ban Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Third meeting of the Conference of Contracting Parties, (18-22 September 1995), Decision iii/1, UNTS Doc. UNEP/CHW.3/35 (Not yet in force).

¹⁰⁸ Moctar Kebe "Waste Disposal in Africa" 1990 14(3) Mar. Pol'y 251 at 252.

states, more than it is to stop export to developing, and particularly, African States.¹⁰⁹ The complex and expensive national and international procedures are better designed for the highly industrialised societies and would be well beyond the capabilities of developing States to institute.¹¹⁰ Sanchez argues that the Basel Convention lacks clear regulation around how violations are to be handled, fails to enunciate liability and suggests that the procedures for notification are better suited to industrialised states than developing States.¹¹¹ The Basel Convention does not provide for the handling of violations, this is to be carried out by Parties to the Basel Convention under Art 9(5) through the establishment of national or domestic legislation. Sanchez further identifies that the notification procedure provides gaps that can be exploited by illegal traders as we have seen in the case of waste exports to Somalia.¹¹² Sanchez would argue that the biggest threat is the illegal traffic in waste. The lack of ‘environmentally sound’ processing and poor controls and management in developing states are equally toxic, is pointed out by Sanchez.¹¹³

The Basel Protocol on Liability is designed to hold to account those responsible for damage caused by pollution.¹¹⁴ It can only be said that there is a distinct lack of political will by the developed States to sign up to this protocol as it has been open for signature for some 15 years and only 10 States have acceded to it, seven of which are African States. It only requires 20 States to have ratified it for it to come into force. Major producers of hazardous waste, the European States, India, People’s Republic of China the UK, and the US, have so far avoided signing it. It must also be said that some of the larger African States are also notable by their absence.¹¹⁵

¹⁰⁹ Cheyne, above n 16 at p493.

¹¹⁰ Cheyne, above n 16 at p501.

¹¹¹ Sanchez, above n 32 at pp143-5.

¹¹² At p145.

¹¹³ At p145.

¹¹⁴ Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal. (Opened for signature 10 December 1999, not yet in force), UNEP/CHW.1/WG/1/9/2

¹¹⁵ “Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Waste and their Disposal.” (1999) Basel Convention <www.basel.int/countries/StatusofRatifications/TheProtocol/tabid/1345/default.aspx>

Somalia at the time of the waste dumping was not a party to the convention. Therefore States who exported to Somalia did not have the consent of Somalia to export to it. The Basel Convention appears to have been breached under the following articles if the waste has come from a party, in this case the allegation as mentioned above is directed at Italy and Switzerland, as the exporters of waste to the Somali coast. Dumping in the sea off Somalia's coast breaches Art 4(2)(b) and Art 4(2)(d). Art 4(2)(d) has been breached, as it would appear that the minimisation of transboundary movement of waste has not occurred by the exporting State. If the Ndrangheta has been handling the export of waste from Italy this would also breach Arts 4(3) and Art 4(5). Art 4(5) that requires no export to non-parties would have been breached, as Somalia was not a party to the Basel Convention in the 1990s when the dumping of waste from Italy is alleged to have occurred. However, should the dumping still be occurring then Somalia, who is now a party, would need to consent to the dumping and the administrative requirements under Art 4 which requires labelling and authorisation from a competent authority to be complied with. The dumping into the sea would not comply with the Basel Convention as it would be hard to argue that it was being handled in an environmentally sound manner or recycled by an established facility that complied with internationally accepted practices. Art 4(7) would appear to have been breached as the waste that has been dumped off the Somali coast is alleged to have been dumped by the Ndrangheta, a criminal gang, who it is suggested, would not meet the requirement to be either authorised or allowed under Art 4(7)(a) to handle hazardous waste. This does not preclude the Ndrangheta from utilising a front company to handle waste. Art 7 that prohibits transboundary movement of waste through a State or States that are not parties appears to have also been breached. For the waste to be transported from Italy to Somalia, even by the most direct of routes, would have taken the waste through the territorial seas of many states, including the transit through Somali waters.

Most of the dumping that has reportedly been carried out off the coast of Somalia occurred in the early 90s and only came to light post the 2004 Boxing Day

tsunami. Post the tsunami the UN was not able to verify all the information regarding the amount of waste and the type washed up as the wider security issues prevented access to the affected areas.¹¹⁶ Considering that pirates initially viewed hazardous waste dumping as a motivation for piracy, the possibility of vessels from Europe or other developed states transiting the hazardous conditions, as far as attacks on vessels go, would seem to be rather slim. The actions of the pirates may indeed have assisted in preventing hazardous waste dumping, however, only extensive research into the condition of coastal waters and assessment of dumping sites will reveal the extent of the dumping and the degradation, if any, to the coastal environment. Given the current inadequate state of the hazardous waste dumping regime it is highly likely that future dumping of hazardous waste will not be stopped.

¹¹⁶ UNEP-UNREDA, above n 8 at p129.

15.4 Regional Agreements

15.4.1 Bamako Convention

Somalia signed the Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (1994),¹¹⁷ (Bamako Convention), on the 1 June 1991 but as yet has not ratified the convention.¹¹⁸ The Bamako Convention came about as a result of Resolution 1153 adopted at the 48th Session of the OAU held in Addis Ababa.¹¹⁹ This resolution firmly condemned those states that were involved in the importation of waste, and declared the practice a crime against the people of Africa and Africa more generally.¹²⁰ This condemnation was followed up by the creation of a draft convention in 1991, which had as its purpose a ban on the importation of hazardous waste¹²¹ as well as regulating trade in waste among African States.¹²² Art 4(1) sets out the ban on all importation of hazardous waste from non-Contracting parties, any import in breach of this article is deemed illegal and a criminal act. The article also specifies co-operation between parties to ensure that there are no imports from a non-Party to a Party to the convention (Art 4 (1)(b)). Art 4(2) covers the dumping of hazardous waste at sea and within internal waters. Art 4(4)(a) sets out the enforcement obligations for parties under both national and international law. Bamako is seen as being complimentary to the Basel Convention, as the Basel Convention makes provision for stricter regional treaties,¹²³ although Clapp maintains that the

¹¹⁷ The Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (signed 30 January 1991, effective 22 April 1998).

¹¹⁸ "List of Countries which have Signed, Ratified/Acceded to the Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa " (2013) African Union <www.africa-union.org/root/au/Documents/Treaties/List/Bamako%20Convention.pdf>

¹¹⁹ Resolution 1153 adopted at the 48th Session of the OAU held in Addis Ababa.

¹²⁰ Clapp, above n 12 at p25.

¹²¹ Clapp, above n 11 at p103.

¹²² Birnie, Boyle and Redgwell, above n 41 at p474.

¹²³ Cheyne, above n16 at p494. The Bamako Convention Art 11(1) requires agreements or arrangements that are not less environmentally sound than those provided for by the Basel Convention.

Bamako Convention is an improvement on the Basel Convention as it bans outright the importation of hazardous wastes including radioactive substances and any form of ocean dumping, as well as banning hazardous substances outlawed in the country of manufacture.¹²⁴

The Bamako Convention adopts a wide definition of hazardous waste in that it includes 'controlled' wastes that are not required to show that they exhibit any of the listed hazardous characteristics, which indicates that the waste streams that are generated as by products of hazardous waste are also hazardous.¹²⁵

The concept of an outright ban on hazardous waste reduces, for African states, the size of regulatory structures required to police the importation and movement of hazardous waste.¹²⁶ The major difference between the Basel Convention and the Bamako Convention is that the Bamako Convention focuses on the prevention of imports of hazardous waste while the Basel Convention focuses on the export of hazardous waste. While the idea behind an outright ban would seem to prevent hazardous waste dumping it has not, as has been discovered in the case of Somalia, been able to prevent illegal dumping. Although, as has been previously mentioned, in the case of Somalia there may be doubts as to when the actual dumping occurred and whether it was legitimate at the time. By signing the convention there is no indication that Somalia has consented to the conditions of the convention unless this is clearly stated in the convention.¹²⁷ The act of ratification, at the constitutional level, will bind Somalia and finally signify its consent to the convention.¹²⁸ Arts 21 and 22 of the Bamako Convention cover signature and ratification. Art 21 states that the parties are not bound on signature, but on ratification or acceptance as formal confirmation or approval as stated in Art 22 (1). Art 22(2) indicates that parties shall be bound by obligations of the convention.

¹²⁴ Clapp, above n 12 at p28 en54.

¹²⁵ Cheyne, above n 16 at p498. Art (2)(1)(b).

¹²⁶ At p500.

¹²⁷ Shaw above Chapter 2, n 65 at p910. There is however an obligation to act consistently with the aims and objectives of the convention, Art 18 Vienna Convention on the Law of Treaties, above Chapter 2, n 103

¹²⁸ Brownlie, Chapter 2 n 55 at p611.

There are several articles within the convention that suggest that there should be a level of cooperation between members and it would not be a significant stretch to suggest that cooperation should include the protection of the environment for downstream states from the dumping that took place off Somalia's coast.¹²⁹ While Art 10 suggests strongly co-operation between parties to the convention by and large the article only suggests co-operation where information is exchanged regarding technical aspects of waste management, (Art 10(2)(a) and (c)), effects of management as far as human health and the environment are concerned, (Art 10(2)(b)), the transfer of technology and technical assistance, (Art 10(2)(d)), and the exchange of technical guidelines and information (Art 10(2)(e)-(f)). There is no indication that parties should actively co-operate in a process whereby a state is having difficulties protecting its environment from hazardous waste dumping which may have a detrimental effect on neighbouring parties. Art 11(4) does suggest a level of co-operation in South – South implementation of the convention but it falls short of suggesting that physical assistance in policing or assisting to police an area should be an avenue that is developed. Art 11(5) does suggest aid to developing countries but more in the direction of developing management and public awareness of hazardous waste as well as the adoption of non-polluting technologies. This obligation to co-operate lies centrally with importing States as opposed to exporting States under the Basel Convention.

As Somalia has only signed the convention and not ratified it, it is not a party and therefore there would be no existing obligation firstly on Somalia to abide by the convention and secondly no obligation on the other parties to assist in the policing of Somalia's waters to prevent hazardous waste dumping. Although Somalia has indicated an intention to be bound through its signature to the Bamako Convention and, if under the rules of international treaties, found under the Vienna Convention on the Law of Treaties, specifically Art 12(1)(c), full

¹²⁹ Kebe, above n 108. Sadia Eden is quoted as saying that the issue of Somalian toxic waste dumping is of great concern as it spills over to other African states. Bamako Convention Art 10.

powers were granted to its representative then it is possible to assert that Somalia, is in effect, a party to the Convention.

15.4.2 Nairobi Convention

The Nairobi Convention for the Protection Management and Development of the Marine and Coastal Environment of the Eastern African Region came into force in 1996 and was amended in April 2010.¹³⁰ Its aims are to promote environmentally sound and sustainable development as well as the sustainable management of marine and coastal systems along the East African Coast. There are 10 contracting parties and Somalia is one of those. Art 4 outlines the general obligations of parties to prevent reduce and combat pollution. The terminology used, 'The Contracting parties shall' indicates a direction that the parties need to obey. Art 6 obligates parties to prevent reduce and combat pollution caused through dumping of wastes and other matter at sea by ships. There is however no definition of dumping, however, it is covered under a broad definition of pollution with the phrase 'introduction by human intervention ... resulting in such deleterious effects as harm living resources, hazards to human health...'

At this point the Convention has not received the necessary 6 ratifications as required under Art 32(2) to enter into force.

¹³⁰ The Nairobi Convention for the Protection Management and Development of the Marine and Coastal Environment of the Eastern African Region (Adopted June 1985 entered into force 30 May 1996). Amended Nairobi Convention for the Protection Management and Development of the Marine and Coastal Environment of the Western African Region, (31 March 2010).

16 How are responsibility, liability and compensation assigned in International Conventions?

The major hurdle facing Somalia in seeking compensation for damage to its environment, caused by hazardous waste dumping off its coast, will be in ascertaining who is responsible and to what degree they are responsible. As has been discussed above, there are allegations that the waste found following the tsunami came from Swiss and Italian firms, however proving this in an international court may be another matter entirely. Secondly, significant time has elapsed since there was major talk of waste dumping off the coast of Somalia. This could be in part due to the unsettled nature of the state and a consequent lack of interest in what was happening off the coast, aligned, of course, with the dangers associated with trying to obtain information in a situation, which could well be described as extremely hazardous. The death of Ilaria Alpi, referred to in the introduction, shows how dangerous investigations into waste dumping allegations can be.¹³¹

With a lack of a central government for more than 20 years the ability of Somalia to track and monitor vessels dumping waste in its waters has been hampered. It could well be difficult to obtain reliable evidence to support prosecutions for waste dumping.

The international environmental protection system should be robust enough to assign liability to those who breach international conventions on waste dumping and to obtain from those duly proved to have been involved, compensation. However things are not as simple or as clear as that.

The Draft Articles on the Responsibility of States for Internationally Wrongful Acts, (Draft Articles), sets out the principles and codifies existing CIL.¹³²

¹³¹ Milton, above n 2 in which the warlord Boqor Musa is quoted as identifying the waste for guns deal as the reason for her killing.

¹³² *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Chapter 2 above, n 200.

Responsibility can be assigned when three factors are present, firstly the presence of an international legal obligation, secondly, that there has been an act or omission which violates that obligation and is imputable to the state responsible and thirdly that loss or damage has occurred as a result of that unlawful act or omission.¹³³

The *Spanish Zone of Morocco Claims* held that,

‘Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility.’¹³⁴

This was further enhanced by the *Chorzow Factory (Jurisdiction)* case where it was held that,

‘It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.’¹³⁵

¹³³ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Chapter 2 above, n 200 Art 2 which describes the elements required as an internationally wrongful act or omission, by a State, attributable to that State, which is a breach of an international obligation. This view is supported by Shaw, above Chapter 2 n 65 at p781.

¹³⁴ *Spanish Zone of Morocco Claims*, see Chapter 2 n 107 at 615 at p641.

¹³⁵ *Chorzow Factory (Germany v. Poland) (Jurisdiction)* (1927) P.C.I.J. (series A) No 9 at p21.

The primary responsibility of a state with regard to the environment is one of not doing or causing harm to other states - *sic utere tuo ut alienum non laedas*. This concept has been utilised by the courts,¹³⁶ as well as through the principles established under the Stockholm Declaration on the Human Environment, Principle 21

‘...the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.’¹³⁷

This approach has been adopted in the UNCLOS in the form of Art 192, which provides that ‘states have an obligation to protect and preserve the marine environment’ and Art 194, which directs states to,

‘...take all measures necessary to ensure that activities under their jurisdiction and control are so conducted as to not cause damage by pollution to other states and their environment.’

When assigning responsibility, which party is to bear the responsibility, is it the State or is it the operator who has actually carried out the dumping? Birnie argues that it should be the State from where the material came.¹³⁸ It is possible that the State where the material was produced would be liable if it were exported to the transshipping State in breach of the Basel Convention. If the breach relates to the export of the hazardous waste it is the export State that is

¹³⁶ *International Commission on the River Oder* (1929) P.C.I.J. (series A) No 23 5AD at p83, see also the *Island of Palmas* (or *Miangas*)(United States v Netherlands)(Awards)(1928) II R.I.A.A. 829, I.C.G.J. 392 (PCA)(1928) case where the concept of territorial sovereignty was widened to cover the instance where there was an obligation to protect within a states territory the rights of other states, see also *Trail Smelter* where the damage needs to have serious consequences and the injury is established by clear and convincing evidence. In the Advisory Opinion to the UN General Assembly on the Legality of the Threat or Use of Nuclear Weapons the court declared that the general obligation to ensure that activities within their jurisdiction and control respect the environment of other states was now part of the corpus of international law relating to the environment.

¹³⁷ *Conference on the Human Environment* U.N. Doc A/Conf. 48/14/Rev. 1 (1972) at p1416.

¹³⁸ Birnie, Boyle and Redgwell, above n 41 at pp222-3.

liable, if however, the breach relates to the actual dumping at sea, then the flag State attracts liability.

The level of damage must also be assessed. At the current time the 'possibility of risk of damage' does not meet the threshold for damage as the practical problems associated with defining and assessing a theoretical level of damage still have not been resolved.¹³⁹ Although the UNCLOS Art 1(4) uses language that the 'risk' of pollution may be enough when it states '... which results or is likely to result in ...'¹⁴⁰ The courts have held in the *Trail Smelter* case that the level of damage must be of 'serious consequence'.¹⁴¹

UNCLOS Art 1(4) points to damage to the quality of seawater, while other conventions, including the UNCLOS specifically mention human health as falling within the range of interests that can be damaged.¹⁴² The LDC has no definition of damage as the focus of the LDC is the reduction in pollution by dumping and that is where the breaches by States would be prosecuted. The LDC at Art 10 suggests that the development of procedures for the apportionment of liability and responsibility are to be undertaken. While there has been agreement to the establishment of procedures to assign liability under the LDC there has been to date no ratification of the agreement and as such is not in force.¹⁴³ This would indicate that there is a lack of political will for States to accept responsibility for either their actions in allowing firms to carry out dumping or for their own lack of compliance with their obligations.

The Protocols, in Art 1, do not cover whether damage includes damage to human beings or is exclusively confined to damage to the environment. Art 3(3) focuses on the transfer of damage or likelihood of damage from one part of the environment to another. This would set a relatively low level of damage to

¹³⁹ Shaw, above Chapter 2, n 65 at p856.

¹⁴⁰ UNCLOS Art 1(4).

¹⁴¹ *Trail Smelter Arbitral Tribunal (United States of America v. Canada)* Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941) at p1965.

¹⁴² Vienna Convention for the Protection of the Ozone Layer 1513 UNTS 293 (opened for signature 22 March 1985, effective 22 September 1988) Art 1(2)

¹⁴³ "Shortlist of Amendments to the London Convention 1972 which Entered into Force (March 2004)" <www.imo.org/About/Conventions/Statusof/Conventions/Pages/Default.aspx>

qualify if the principle of *sic utere tuo ut alienum non laedas* is applied as a general rule of international law. The Protocols Art 15 mentions damage to the environment of other states or to any other area of the environment but does not specify if humans are included. The Bamako Convention at Art 1 which covers definitions does not cover damage and Art 12 which deals with liabilities and compensation makes no mention of the type of damage that is covered, whether the compensation is to be focused on the environment or whether it covers consequential damage to humans as well. While the waste in the case of Somalia was dumped at sea and washed ashore on its coastline the deaths occurred when the villagers investigated the contents of the containers so the question of whether these deaths occurred as a result of dumping at sea and thus fall under UNCLOS could be argued.

The disputed nature of the territorial waters of Somalia could also provide a layer of complexity when seeking to apportion responsibility, as well as the exact location of the dumping, as it might have occurred outside any territorial waters and thus be located in the area where questions of *locus standi* might arise. In the case of Somalia its ability to have standing before a court could well be affected by the consequences of being a failed state as there is no one authorised to represent the State as discussed in Chapter 2.

The matter of assigning responsibility is further mired when there are multiple actors involved; the actor actually carrying out the dumping of waste, a shipping company perhaps or ship owner, and the person who contracted that vessel to carry the waste. As has been seen in the chapter on illegal fishing, trying to assign responsibility where a vessel is using a FOC would only lead the investigation back to the state of registry and a possibly hard to track company, registered to a post box or some similar evasive measure. Certainly the allegation in the case of Somalia and waste from Italy is that those responsible were criminal organisations.¹⁴⁴ While Birnie et al argue that the State is ultimately responsible for prevention, cooperation and notification of breaches of treaties,

¹⁴⁴ Hari, above Chapter 3 n 16.

citing the *Trial Smelter*, and *Pulp Mills* cases as precedent, these cases revolve around neighbouring States and is quite different from the case of waste dumping at sea where, determining which State is responsible, the flag State or the exporting State, is slightly more difficult.¹⁴⁵ There is also a significant legal difference in that the cases cited were lawful activities that created harm, which was unlawful, as against the dumping at sea, where the activity itself is unlawful. Indeed, if as asserted by Birnie that the exporting State is only responsible for lack of due diligence or a breach of obligations, then it is conceivable that both the flag State and the exporting State could be liable.¹⁴⁶

The Bamako Convention at Art 12 suggests that there should be the production of a draft protocol to establish procedures and rules for the assigning of liability and compensation for damage.¹⁴⁷ Decision 1/19 of the Conference of State Parties 26 June 2013 established an ad hoc expert group on Liabilities and Compensation although to date there has been no suggestion as to how this group has progressed.¹⁴⁸

The Basel Convention established a protocol in 1999 with regards to liability and compensation for damage resulting from Transboundary movements of hazardous waste.¹⁴⁹ Damage is defined under the Protocol as,

‘loss of life or personal injury,¹⁵⁰ loss of or damage to property with the exception of the property of the person liable;¹⁵¹ loss of income directly deriving from an economic interest in any use of the environment, incurred as a result of impairment of the environment;¹⁵² the costs for

¹⁴⁵ Birnie, Boyle and Redgwell, above n 41 at p214.

¹⁴⁶ “Decision 1/19 of the Conference of State Parties 26 June 2013 to Bamako Convention” (2013) <[WWW.unep.org/delc/portals/119/Bamako/C1DEC.19Liabilities and compensation item 1.>](http://WWW.unep.org/delc/portals/119/Bamako/C1DEC.19Liabilities%20and%20compensation%20item%201.>)

¹⁴⁷ Bamako Convention, above n 117 Art 12 Liabilities and Compensation.

¹⁴⁸ “Decision 1/19 of the Conference of State Parties 26 June 2013 to Bamako Convention” (2013) <[WWW.unep.org/delc/portals/119/Bamako/C1DEC.19Liabilities and compensation item 1.>](http://WWW.unep.org/delc/portals/119/Bamako/C1DEC.19Liabilities%20and%20compensation%20item%201.>)

¹⁴⁹ Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal, (open for signature 6-17 March 2000, not entered into force)

¹⁵⁰ Basel Protocol on Liability Art 2(2)(c)(i).

¹⁵¹ Basel Protocol on Liability Art 2(2)(c)(ii).

¹⁵² Basel Protocol on Liability Art 2(2)(c)(iii).

reinstatement¹⁵³ of the environment¹⁵⁴; and the costs of preventive measures,¹⁵⁵ including loss or damage caused by these measures.’

Some of these terms are quite broad and would provide cover for damage caused to the marine environment utilised by Somali fishers as well as compensation for the loss of life of the villagers who died as a result of contact with the rusting containers on the beaches. The distribution of liability is assigned to the generator exporter, importer disposer. The notifier or generator/exporter is strictly liable until the waste is delivered to the disposer.¹⁵⁶ Strict liability only attaches to the leg of the journey where the Basel Convention applies.¹⁵⁷ It has been suggested that the generator avoids liability when the export of the waste is taken over by a smaller company who in the circumstances act as the notifier.¹⁵⁸ The Protocol requires twenty ratifications before entering into force. At present there have only been 13 signatories to the protocol.¹⁵⁹

There is little argument over the standard to which States should be held for liability. Both the Bamako Convention and the Space Objects Liability Convention hold to a direct or absolute standard for damage.¹⁶⁰

¹⁵³ Basel Protocol on Liability Art 2(2)(d).

¹⁵⁴ Basel Protocol on Liability Art 2(2)(c)(iv).

¹⁵⁵ Basel Protocol on Liability Art 2(2)(c)(v).

¹⁵⁶ Basel Protocol on Liability Art 4(1).

¹⁵⁷ Michael Tsimplis “Liability and Compensation in the International Transport of Hazardous Waste by sea: The 1999 Protocol to the Basel Convention” 2001 16(2) International Journal of Marine and Coastal Law 295 at p312.

¹⁵⁸ Tsimplis, above n 157 at p314.

¹⁵⁹ “Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal 1989” (1989) <www.basel.int/Countries/StatusofRatifications/TheProtocol/tabid/1345/default.aspx>

¹⁶⁰ Clapp, above n 12 at p28 and Bamako Convention Art 4 (3) (b), which applies solely to waste generators within Africa.

17 Can Somalia obtain Compensation for the harm to its environment?

The public associates environmental contamination with catastrophic harm to human health although that might not be the case.¹⁶¹ Part of the problem with bringing a successful suit for compensation is the very nature of environmental law, being complex, filled with aspirational qualities and due to its evolutionary nature, reliant on scientific, political and social norms.¹⁶² It has been suggested that the duty more often than not on states is to negotiate over a settlement and or measures to be taken as opposed to the award of compensation.¹⁶³ The *Trail Smelter*¹⁶⁴ case is the only one where compensation has been awarded for actual environmental damage.¹⁶⁵ It is of course not easy to define a quantum of damage as the effects of environmental damage can be significantly long lasting and the fullest extent of the damage may never be known by either the claimant or recipient state. Any suggestion of compensation should be quite wide ranging and encompass not only the costs of reinstatement of remediated territory but also include total clean-up costs and costs to minimise on-going damage.¹⁶⁶ With environmental damage caused through dumping at sea it is hard to identify accurately the amount of damage as well as clearly identify the outer reaches of the damage to a natural resource (both the quality of water and the effects on fish life) that literally flows in and out of the territory of the claimant state.¹⁶⁷ This problem is compounded further by the lack of sufficient evidence on which to build a case, as in Somalia's case, the base line level of water quality and fish health is more than likely not available due to the collapse of government and the destruction of state records going back to before 1991. While seeking

¹⁶¹ Kathleen F Brickey *Environmental Crime: Law, Policy, Prosecution* (Wolters Kluwer, New York, 2008) at p2

¹⁶² Brickey above n 161 at p11.

¹⁶³ Birnie, Boyle and Redgwell, above n 41 at p227.

¹⁶⁴ *Trail Smelter Arbitral Tribunal*, above n 136 at p1933.

¹⁶⁵ Birnie, Boyle and Redgwell, above n 41 at p227.

¹⁶⁶ At p229. The polluter pays principle in action.

¹⁶⁷ At p230.

compensation for damage might be a more western approach to the problem, in Somalia's case it is suggested that bringing peace and security and the re-establishment of government services along with the exertion of some form of control over industry and manufacturing might be higher priorities for the government.

The foregoing conventions establish varying time limits within which claims must be lodged. The problem that arises for Somalia and any tribunal is the requirement that the time be established as to when a state could reasonably be expected to know about the situation that gave rise to the dumping. Does it occur when a failed state is recognised as not being a failed state? Does the non-failed state, by inference a successful state, have a backwards recourse to the time when the actual event occurred during the period of failure? What is the measure by which the state is considered a non-failed state? In the case of Somalia is it when elections have been held and a new constitution created? But in Somalia's case there are still two regions which are declaring themselves independent, Somaliland and Puntland, if that is the case does this effect the qualification of being a non-failed state? Who decides when a failed state has become a non-failed state? Is it a declaration by the UN who hasn't officially declared Somalia a failed state? The previous section on state responsibility and liability has attempted to answer some of those questions. It is the courts that will have the final say if the matter ever gets that far.

18 Conclusion

It is suggested that as a global community of states the notion that all states are interdependent needs to be realised. In doing this, states, would acknowledge that each is a small part of a greater environmental system and the temptation to knowingly allow pollution to occur to another state would be reduced and the motivation to produce less waste within the borders of each state might take on more significance than it apparently does while the ocean is still seen as a repository for waste.

The combined effect of the major conventions that cover waste dumping should theoretically have prevented waste from being dumped in the waters off the coast of Somalia. However as has been shown, there is a lack of political will to ratify important aspects of these conventions that could serve to strengthen these conventions and provide more of an incentive to take a greater interest in monitoring how waste is dealt with, both internally as well as in its export to developing countries.¹⁶⁸ MacDonald has highlighted that States or members of a community benefit from the protection of that community. Therefore a State acting to preserve the good of that community is also preserving its own individual good.¹⁶⁹ As has been argued by Beyerlin and Marahaun this concept of acknowledging the overall solidarity of States as members of the same community will provide a significant moral incitement to dismantle the North-South dichotomy that supports a view that developing countries do not need to be protected from waste dumping as much as developed countries.¹⁷⁰ If as suggested, we are all members of the same community, there is no legal barrier to a State party to any of the above conventions holding a member party to account if a State becomes aware of breaches perpetrated by that member party. This would necessitate a State choosing to act in the role of guardian for States who were unable to protect themselves from dumping carried out in breach of anyone of the conventions listed above. This action can be supported legally on

¹⁶⁸ Clapp above n 12 p30.

¹⁶⁹ MacDonald 1996, 301 p35.

¹⁷⁰ Beyerlin Ulrich and Marahaun Thilo International Environmental Law, 2011 Oxford Hart Publishing. p36.

the basis of the Draft Articles on State Responsibility Art 41, which allows all States to cooperate to end a serious breach by another State, regardless of whether they are affected by the breach or not.¹⁷¹ States would have a positive obligation to other States, as in the case of obligations *erga omnes partes*, which is more related to when a State breaches an obligation that is owed to a group of States to which it is a member in relation to regional, human rights or environmental issues. Third States are able to demand cessation and performance in the interests of the injured State of the obligation breached.

It is acknowledged that in the current atmosphere States are reticent to take positive action on behalf of another State, as it is possible that action of this nature could create public interest law at the international level that would create precedents that might be held against acting States in the future.

States have obligations to each other as members of the international community to protect those incapable of protecting themselves or more particularly to protect their environment, as all States share the same basic resources by way of air and water. In acting to help a State protect its environment other States are acting in protecting the collective environment. As has been held in the *Nuclear Tests* case,

‘The rights are the same for all. They reflect a community interest in the protection of the security, life, and health of all peoples and in preservation of the environment. The rights are held in common and the corresponding obligation imposed on France (and on any other nuclear power) is owed in equal measure to New Zealand and to every other member of the international community. It is an obligation *erga omnes*.¹⁷²

It is a small price to pay if there is belief in the desire to protect the seas from pollution and degradation that will be with successive generations for a long time to come.

¹⁷¹ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, above Chapter 2 n 200 Art 41.

¹⁷² *Nuclear Tests (Australia v. France) (Australian Memorial)* 1 ICJ Pleadings 334, at pp334 -5 para 448.

The short coming of international agreements is displayed when non parties, like Somalia, that wasn't in a position to join some of the waste dumping conventions, is left unprotected from those who actively seek out States where enforcement is lax in order to dump waste. This activity is compounded when States that are parties lack the will to enforce conditions on actors that come within their territorial jurisdiction and to fully meet their obligations and duties while respecting the rights of others.

The state of the present conventions and the level of dumping globally is perhaps a vast improvement on the use of the sea as an unregulated dump that flourished between 1945 and the 1970s. However much has been achieved it is still possible to improve the response from States and complete some of the outstanding pieces of the framework that are still left unfinished, such as the ban on hazardous waste shipment to non OECD countries and associated liability conventions.

The oceans are as an important contributor to the overall health of the planet and a vital part of the global eco-system, not a dumping ground for waste produced by man who lacks the initiative, drive and will to maximise the waste produced by the industrial complexes of the world. While waste can still be dumped there is a minimal incentive to actively minimise waste production and minimal incentive to redefine the perspective of the ocean as anything other than a dumping ground. That the health of the ocean is important to man can be seen in the recent report that covered the loss of bird life and fish life in the Pacific Ocean, contributed to in part by the enormous amount of waste generated by the 2011 tsunami in Japan. ¹⁷³

¹⁷³ Ray Greg "The Ocean is Broken." (22 October 2013).

Chapter 5

Piracy

I am the Horn of Africa
Countless have died
No one knows their names, no one cares
They've just become a statistic
(Helwaa)¹

Introduction

The previous three chapters have dealt with issues that have played a part in the rise in piracy off the coast of Somalia since the end of the last century. The previous chapters also looked at the indifferent response by the international community, particularly the lack of response by the United Nations (U.N.), flag States and port States to ships who have allegedly been carrying out either illegal fishing or hazardous waste dumping. This chapter looks at piracy, an issue that has generated a significant response from the international community, including the UN.

It would be hard to calculate the number of scholarly voices that have contributed to the international discussion on piracy off the coast of Somalia. It is highly likely that the vast majority of this discussion is either Eurocentric or Americentric with a few Asian and African voices also contributing. It is therefore suggested that the discourse has a significant bias in the favour of the victims and those who are active in policing the crime. The only contribution that has been made by the perpetrators is limited to a sentence scattered throughout media reports.²

Much of the scholarly debate has centred on the concept of piracy and its definition as stated in the UNCLOS. Each aspect of the definition has been well

¹ Cachia, above Chapter 1 n 1

² Tharoor, above Chapter 3 n 14 and Waldo, above Chapter 3 n 19.

mined for academic exposure. Numerous books have been written to cash in on the tide of piracy's currency. There has even been a movie that focussed on the capture of the Maersk Alabama³ and its release by the US Navy. The irony of that situation is that the survivor wasn't charged with the 'romantic' crime of piracy but the more mundane crime of seizing control of a ship by violence,⁴ (*United States of America v Muse*), found in the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 (SUA Convention).⁵

As stated in Chapter 3 notification of the problems caused by IUU Fishing and Hazardous Waste dumping was notified to the UN and various other regional organisations in 1991 and 1992 and 1995. The UN was aware of the problem and one of its advisers warned of the consequences in 1997.⁶ It is therefore not possible to claim that the costly consequences of piracy off the coast of Somalia lie fully at the door of Somalia. The UN and the other regional organisations that were notified of the problems and failed to act must bear some of the responsibility. Poverty is widespread in Somalia and the actions of the western world in fishing, possibly illegally, in Somali waters, combined with the dumping of hazardous waste, has provided motivation for some Somalis to prey on commercial shipping.⁷

As discussed in Chapter 2 the creation of Somalia was the product of a colonising effort from three different States, the British, Italian, and the French. The system of colonisation was based on a system of taxation, extraction, and domination.⁸

³ Captain Phillips, Sony Colombia Pictures 2013, of the Maersk Alabama incident in 2009.

⁴ *United States of America v Muse*, United States District Court, Southern District of New York, USA-335-274(Ed 9-25-58) for which he is now serving 33 years and 9 months in prison.

⁵ The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 entered into force March 1992

⁶ Lang Report, above Chapter 3, n 103 at p9.

⁷ Chapter 3 highlighted the loss fish stocks estimated at some \$300M which compares favourably with the annual amounts of ransom taken through piracy. Peter Lehr has been quoted as saying "It is like a resource swap, Somalis collect up to \$100m a year from pirates ransoms off their coasts. And the Europeans and Asians poach around \$300m a year in fish from Somali waters" Paul Salopek "Off the lawless coast of Somalia, questions of who is pirating who" *Chicago Tribune* (Chicago, 10 October 2008.).

⁸ See Pureza, above Chapter 2 n 8.

This was to the benefit of the colonisers and to the detriment of the colonised. When the process of decolonisation occurred the two major powers of the day sought to exert their dominance through influence over smaller strategic States. Somalia, because of its geographic location was one of those. Both Russia and America at varying times were exploiting Somalia for the exercise of their self-interest.⁹ Admittedly, both of these were invited in by the existing government of the day as outlined in Chapter 2. With the ousting of the Barre government Somalia declined into a state of lawlessness as various tribal and clan factions sought to exert control. The UN intervened and peacekeeping forces were despatched to restore peace.

The major missions by the UN to bring peace to Somalia were mounted in the early 1990s. There were two main missions known as UNISOM I and II. Their aim was to monitor peace and to create conditions that allowed for the successful distribution of aid to starving Somalis. However, after the arrival of UNISOM I the two main factions within Somalia resumed their armed conflict and it was beyond the ability of the small UNISOM force to counter their activities. The US stepped in and UNISOM II was created with a view to securing operations to allow the humanitarian aid to proceed. Part of the mission also related to the capture of the two main warlords. The efforts to achieve this did little more than alienate those for which the mission had been established.¹⁰ The Somalis turned against the US and UN forces after civilian casualties were incurred in the hunt for these warlords. This change in circumstances led to a significant number of deaths amongst both Pakistani and US forces.¹¹ It was on the back of these deaths that UNISOM II was recalled and Somalia was left on its own.

It is suggested that at this point in time the people of Somalia had suffered enough at the hands of the international community. Combine this with the appearance of foreign fishing trawlers off the coast inhibiting the ability of people to survive and it is only natural that the proliferation of arms left behind

⁹ See Herbst, above Chapter 2 n 4 at p124.

¹⁰ Christiane Philipp "Somalia-A very Special Case" in A Von Bogdandy and R Wolfrum (eds) Max Planck Yearbook of United Nations Law (Koninklijke Brill, Netherlands, 2005) 517-554 at p541.

¹¹ At p541.

by the Cold War would be put to use in the protection of 'their' fisheries'.¹² The reported incidents of trawlers being stopped goes back as far as 1991.¹³

2004 brought the tsunami from Indonesia that caused wide spread problems along parts of the coast of Somalia. The seas brought to the shore a deadly concoction of hazardous waste that had been dumped in the waters off the coast¹⁴ and destroyed fishing skiffs and nets.¹⁵ The destruction of the tools that gave access to a much needed food source appears to have been the motivator for some fishermen to turn their hand to piracy.

The rate of recorded pirate events at its peak amounted to less than 1% of the 23,000 vessels that pass through the waters off the coast of Somalia annually.¹⁶ The estimated annual cost of piracy to the global community is in the vicinity of USD6Bn-USD18Bn.¹⁷ Piracy off the coast of Somalia accounted for just over half, 53%, of all international piracy incidents at its peak in 2009.¹⁸

¹² Scott Coffen-Smout *Pirates, Warlords and Rogue Fishing Vessels in Somalia's Unruly Seas* (1998) p2.

¹³ Waldo, above Chapter 3 n 19. Waldo cites trawlers from Egypt, India, Italy, Kenya, Taiwan, Ukraine, Yemen as being captured. However these were not the only ships targeted. Coffen-Smout, above n 12 at p3 cites a freighter and its tow vessel also captured for ransom in 1998. S Hansen *Piracy in the Greater Gulf of Aden: Myths, Misconceptions and Remedies* (Norwegian Institute for Urban and Regional Research, Oslo, 2009) at p20 describes cargo ships being targeted as far back as 1991.

¹⁴ UNEP-UNREDA, above Chapter 4 n 8 at p134.

¹⁵ D Burale *FAO Post Tsunami Assessment Mission to Central and South Coast of Somalia* (Food and Agricultural Organisation, 2005) cited by Emmanuel Sone "Piracy in the Horn of Africa: The Role of Somalia's Fishermen" (Naval Postgraduate School, 2010) at p49-51 cites 1630 skiffs lost and 33,000 nets destroyed.

¹⁶ Lang Report, above Chapter 3, n 103 p17, puts the figure at 22,000 – 25,000. The UNODC report, *Transnational Organised Crime in Eastern Africa: A Threat Assessment* (United Nations Office on Drugs and Crime, 2013) at p35, puts the figure at 42,500 quoting International Maritime Bureau statistics.

¹⁷ *Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities Off the Horn of Africa* (World Bank, 2013) at p33, estimates USD18 Billion per year. The wide variance in approximate cost is due to different factors being used to assess the cost from supplying naval assets through to the costs of insurance and security to economic losses to shipping caused through delays and economic losses to shippers and their customers, prosecutions and associated court costs and prison costs are also included.

¹⁸ L Ploch and others *Piracy off the Horn of Africa* (Congressional Research Service, Washington, 2011) at p1 citing International Maritime Bureau statistics. IMB Statistics for 2009 showed piracy passed 406 reported events of which 217 were Somali sourced attacks involving 47 pirated ships, IMB Piracy Centre, '2009 Worldwide piracy figures surpass 400 (14 January 2010) www.icc-ccs.org.

It is the purpose of this chapter to attempt to look at piracy from the Somali perspective; to review the history of African piracy through that lens and to analyse the international law of piracy from that perspective.

This gives rise to questions such as what is piracy, what are the enforcement powers possessed by State navies operating off the coast of Somalia, do all States have the same legislation regarding piracy and does Somalia have anti piracy legislation?

The navies confronting the issue of piracy off the coast of Somalia have been exposed to a number of issues surrounding the human rights of the pirates. These issues will be examined in light of modern trends for dealing with captured pirates and the disposition of their skiffs and attendant legal issues.

The need for security on board merchant shipping as it passes through the waters off the coast of Somalia has brought problems as security companies are employed to protect the ships. The lack of controls on security companies, in what is a globally unregulated industry, has led to a number of incidents where pirates have been killed. Issues of liability and responsibility are investigated to ascertain how well these events are dealt with.

The responses to incidents of alleged illegal fishing and hazardous waste dumping are investigated in previous chapters. In this chapter, the global response to piracy is investigated.

19 A brief history of African Piracy.

Compared to the European history of piracy that dates back to very early Greco-Roman times, the history of African piracy is quite short. The advent of Barbary Coast piracy was in the early 1500s and reigned in various guises through to the mid 1800s when the force of American intervention closed it down.¹⁹ The Barbary Coast corsairs ranged out of modern Algeria, Tunisia, and Libya and had the protection of the Sultans or 'Deys' of those states.²⁰ These pirates raided into the Mediterranean and the northern Atlantic against shipping of all different nations including the English. Such was the strength of this pirate activity that the leaders were able to negotiate with sovereign powers to form alliances.²¹ The stranglehold that was exerted on Mediterranean commerce was such that the pirates were able to obtain 'concessions' from sovereigns, including America that signed two treaties in 1795 and 1816,²² by which the pirates were paid a tax to allow the commercial vessels to pass without being raided.²³ The signing of treaties and the paying of concessions or tribute continued until the early 1800s.

The defining characteristics of this period of piracy are that it has been viewed as one of religion and taking hostages for ransom or slavery. The pirates of the Barbary Coast were Muslim and they were holding to ransom the Christian world, and taking its peoples as slaves for their benefit. Davis asserts that this taking in slaves was an act of revenge against the Christian world for the damage of the Crusades and the violence imposed on Muslim communities.²⁴ There is little doubt that the corsairs of the Barbary Coast were efficient at their work.

¹⁹ L Bento "Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Enables Piracy to Flourish." 2011 29 Berkley Journal of International Law 399 at p400 fn20.

²⁰ J de Montmorency "Piracy and the Barbary Corsairs" 1919 35 Law Quarterly Review 133 at p136.

²¹ At p 139. Cites an alliance with France and Turkey, although signed directly by the Sultans and not the pirate leaders.

²² At p 140

²³ At 140 where these concessions are described as blackmail.

²⁴ Robert Davis *Christian Slaves, Muslim Masters: White slavery in the Mediterranean, the Barbary Coast, and Italy 1500-1800* (Palgrave Macmillan, New York, 2003) at pxxv.

The estimates obtained by Davis indicate the number of those enslaved as between sixteen hundred thousand and one million slaves taken.²⁵

A further characteristic of the Barbary Coast corsairs is that there are insinuations that it is not 'true' piracy, that it was in fact privateering as the actions of the corsairs were supported by the reigning sultan of the day. This is dependent on the viewpoint of the writer. The vast majority of European sea powers during the same time, between 1500-1800, utilised privateers to harass and interrupt the trade of their enemies.²⁶ Shnider argues that there is very little difference between a pirate and privateer as far as their actions go.²⁷ It is also highly likely that the view as to whether a pirate is a pirate or privateer would depend on who the target is, as the English were not restrained in calling the Barbary corsairs, 'pirates' when their actions were the same as those of the licensed English privateers.²⁸

The reign of the Barbary corsairs was eventually brought to a close by the actions of a number of States ostensibly making war with the Barbary States.²⁹

From a Somali perspective history provides a link to a once successful period. The North African States raided the lucrative European and emerging American trade routes for both property gain as well as for the payment of tribute or ransom for the crews that they held in slavery. There is no indication that the piracy that has occurred off the coast of Somalia has been motivated from the same religious base as the Barbary Coast corsairs. It is possible that the Somalis share the history of the Barbary Coast through a common religious background. That the Barbary Coast pirates were driven by revenge for violence perpetrated

²⁵ Davis above n 24 at p8.

²⁶ Alfred Rubin *The Law of Piracy* (2nd ed, Transnational Publishers, New York, 1998) at p18. Privateers being licensed by a sovereign to carry out this action under a letter of marque and reprisal.

²⁷ Samuel Shnider "Universal Jurisdiction over "Operation of a Pirate ship": The Legality of the Evolving Piracy Definition in Regional Prosecutions" 2012 38 N.C.J.Int'l L.& Com. Reg. 473 at p487.

²⁸ Rubin, above n 26 at p13.

²⁹ Montmorency, above n 20 at p 141 the British in 1816, the French in 1830, M Boot "Pirates, Then and Now" 2009 88(4) *Foreign Affairs* 94 at p99 states that the Americans started their war with the Barbary States in 1801 and continued until 1815.

against them by the Christian Western world is one possibly shared by the Somalis, as their recent history, from colonisation onwards, has been one of subjugation and invasion by foreign powers including the UN forces of UNISOM. They have been exploited for self-interest during the Cold War and then left on their own helpless to protect their fishing grounds from illegal fishing and hazardous waste dumping. This must certainly have generated feelings of animosity towards the developed world. As the people of Somalia suffered from droughts, poverty, and internal lawlessness, just off its coast billions of dollars of trade goods sailed past. This could well have served to fuel that animosity. It must also be acknowledged that the actions of the postcolonial government, in particular that of Said Barre, has also contributed to the current state of lawlessness and poverty in Somalia.

It could be said that the pirates of Somalia saw a rich resource that needed to be exploited for gain, much as Somalia has been exploited for gain, by the colonists and secondly by the Cold War powers. If an analogy could be drawn between the piracy of the Barbary Coast and the exploitation of Somalia it could be that the Western or European powers thought that privateering was a legitimate way of dealing with those who were competitors for the same trade and goods, until privateering was applied to them by a more efficient and ruthless trader. Then the rules were changed; consequently, privateering was outlawed in 1856 at the Paris Declaration.³⁰ The Somali pirates possibly saw a resource that could be exploited to the benefit of a few, much as their waters were being exploited for fish and the dumping hazardous waste.³¹ The Somalis, quite possibly, were not aware of any negative consequences for those exploiting their waters; the lack of action by the international community could be viewed as condoning those activities. This may have provided the impetus to extract some benefit from the resource without the thought of punishment.

³⁰ See Paris Declaration, above Chapter 3 n 139.

³¹ Waldo, above Chapter 3 n 19.

20 What is piracy?

The definition of piracy is contained in UNCLOS at Art 101,

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Piracy in its most simplistic form therefore is the stopping of a ship by some form of violence³² and either taking the goods from the ship, or taking the ship, or taking the ship and crew and holding them for the payment of money. These actions need to occur between two ships that are privately owned, (not the property of the State).³³ This action needs to be done with a view to financial gain for those who take part and not on behalf of a State. The acts of violence or detention need to be illegal and not part of a legitimate stopping of a ship where authority is given to ships under international agreements or under Art 110 of

³² Rubin, above n 26 at pp1-70 utilises extreme levels of violence, 'kill' and 'murder' discussed in early definitions of piracy while Barry Dubner *The Law of International Sea Piracy* (Martinus Nijhoff, The Hague, 1980) at p1 starts with 'murder' and 'rape', again at extreme ends of violence.

³³ Rothwell and Stephens above Chapter 3 n 95 at p162 suggest that actions taken for political motives are excluded from the definition of piracy.

the UNCLOS to stop other ships.³⁴ The inclusion of the term illegal acts in the definition has been argued as expanding the range of conduct that creates the liability.³⁵ Piracy can also be committed by those that encourage others to carry out the stopping of the ship and the taking of its goods or those who sail on the ship knowing that it is going to stop a ship and take the goods or hold the people on board for a payment of money. Some States refer to 'piracy' when these actions occur within the waters of their State or territorial sea.³⁶ The international community calls these actions 'piracy' when they occur on the 'high seas'.³⁷

UNSC Res 1814 (2008)³⁸ calls on States to 'protect shipping' that delivers humanitarian aid to Somalia after some aid vessels had been pirated off the coast of Somalia. UNSC Res 1816 (2008)³⁹ in the second paragraph of the preamble is 'gravely concerned by the acts of piracy and armed robbery' against humanitarian aid which is some three years after notification by the IMO, that there was a problem with piracy and armed robbery. It is not stated here as to whether the UN sanctioned actions are to take place on the high seas and thus within the jurisdiction of states under UNCLOS and within the definition of piracy, or within Somalia's territorial waters and therefore within the jurisdiction of Somalia and outside the definition of piracy. In UNSC Res 1816 the strongest action recommended is found in paragraph 2 where states are 'encouraged to increase and coordinate efforts to deter acts of piracy'. This is quickly followed by paragraph 7(a) where States are authorised to enter Somalia's territorial waters and to exercise rights, found in international law and permitted on the high seas, to repress piracy, and under 7(b) to use all necessary means to do so. This statement extends the definition of piracy into the

³⁴ Robin Geiß and Anna Petrig *Piracy and Armed Robbery at Sea* (Oxford University Press, New York, 2011) at p 59 states that the act is dependent on the domestic law of the State that undertakes jurisdiction to try the pirates.

³⁵ Douglas Guilfoyle *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, Cambridge, 2011) at p43.

³⁶ Rothwell and Stephens, above Chapter 3 n 95 at p163.

³⁷ At p162.

³⁸ *United Nations Security Council Resolution SC Res.1814, S/RES/1814 (2008)* Paragraph 11.

³⁹ *United Nations Security Council Resolution SC Res.1816, S/RES/1816 (2008)*

territorial waters of a state and arguably outside the definition contained in UNCLOS. There is a note of caution included in this resolution where it is restricted to the situation in Somalia, paragraph (9), for a period of 6 months, paragraph (7). UNSC Res 1846 extended this power to enter Somalian territorial waters for a further period of 12 months, paragraph (10) and reaffirmed that this was restricted to the situation in Somalia, paragraph (11). These paragraphs of the resolutions are counter to the definition which holds that piracy can only be committed on the high seas or in areas beyond the jurisdiction of any State, (Art 101(a)(i)(ii)).

Art 101 does not create an international law of piracy; it creates an internationally recognized definition of piracy. Geiß and Petrig assert that the law of piracy is only found in domestic or municipal law.⁴⁰ Piracy is also a creation of CIL however, there is argument that suggests that this is not so.⁴¹

Art 101 is the result of many years of discussion and several proposals as to how the law of piracy should look. The advent of the 20th century saw several attempts to codify the crime of piracy. The first of these was a list of subjects of international law developed by the League of Nations in 1924 that included piracy and was circulated to governments in 1926.⁴² These draft articles defined piracy as depredations upon property or acts of violence against persons on the high seas, committed for private ends, (Art 1). A distinction was drawn between political acts and acts committed for gain. Art 1,

⁴⁰ Geiß and Petrig, above n 34 at p139 – 141. They cite the extensive work of the Harvard Draft authors and the follow on by the ILC prior to the formation of the 1958 Convention on the High Seas as supporting their view. It could be argued that the international law of piracy existed as a result of CIL. As discussed in Chapter 3, CIL consists of both the belief and the practice of states. There may be a significant belief that piracy is an international law, however the practice of states is quite different. The small number of domestic laws sampled below indicates some have imported the UNCLOS as the law of nations, while others have created their own legislation that is quite different and others that have no piracy law at all. See also Michael Passman “Protections Afforded to Captured Pirates Under the Law of War and International Law” 2008 33(1) Tul.Mar. L. J. 1 at p11 n 71 where a comprehensive discussion of both sides of the argument is detailed.

⁴¹ H Tuerk “The Resurgence of Piracy: A Phenomenon of Modern Times” 2009 17(1) University of Miami International and Comparative Law Review at p3

⁴² League of Nations pub. C.196.M.70.1927.V at p119.

“It is not involved in the notion of piracy that the above mentioned acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy”

Art. 3 stated that only a private ship and not a warship could commit piracy. Art 5 provided the right of every warship to stop and capture a ship if the crew of that ship had committed piracy. This right was only exercisable on the high seas. Art 5 also supplied a right of hot pursuit into territorial waters unless the littoral state was able to continue the pursuit. This right was conditional on the matter being submitted for judgment with the littoral State. Jurisdiction was limited to the State of the ship carrying out the capture, unless it was conducted under Art 5 or unless an international convention or domestic law decided differently, (Art 7).

Governments reviewed the draft articles and made submissions on them at some length. They were not however, included in the final conference.⁴³

The Harvard Draft Convention on Piracy, (HDC),⁴⁴ was created out of the desire of Harvard University to contribute to the work being done by the League.⁴⁵ The result was 19 Articles that brought together the known work on piracy at both domestic and international level. The 19 articles produced covered a wide range of subject areas related to piracy including a definitional article, Art 1 and an extensive definition of piracy under Art 3,⁴⁶

‘Article 3

Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:

⁴³ League of Nations Doc. C.254.1927.V. cited by Rubin above n 26 at p334 n69.

⁴⁴ The Harvard Draft Convention on Piracy 26 A.J.I.L Supplement 749 (1932)

⁴⁵ Rubin above n 26 at p335

⁴⁶ It is interesting to note that under this definition piracy can be committed from the sea as well as on the sea, which would imply that it could be committed on land. This implication is supported by Art 4(1), which indicates that piracy may be committed in the territory of a state by descent from the high seas. There is no clear indication in the draft convention as to whether the ‘territory’ referred to was the complete territory including the land mass as well as territorial sea or just the territorial waters. This appears to be a reflection of the actions of pirates of old who descended from their ships to raid ashore for provisions and property than a reflection of the state of affairs as existed at the time the draft convention was written.

Any Act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack which starts from on board ship or another ship which is involved must be a pirate ship or ship without national character.

Any act of voluntary participation in the operation of a ship with knowledge of the facts which make it a pirate ship.

Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.'

The ILC contributed to the codification of piracy through their work on the law of the sea in 1950s, as requested by the UNGA. The final report was produced on the 1 March 1954.⁴⁷ This draft law of the sea included six articles on piracy, which were in essence, the French translations of Arts 3, 4(1), 5, 6 10, and 12 of the HDC.⁴⁸

The Convention on the High Seas of April 29 1958 was the first codification of piracy. The terms 'rape', 'enslave', 'wound', 'imprison' or 'kill' were removed from the definition of piracy created by the HDC. This, now altered draft Art 1, became Art 15 of the Convention on the High Seas. The remaining articles from the draft convention filled Arts 14 and 16 -21 of the Convention on the HS.⁴⁹

Rubin asserts however that this process is not the codification of the law of piracy as the HDC included a view of how the law of piracy should be, so was in essence *de lege ferenda*.⁵⁰ In the literature to date there has seems to be no further discussion of this point. Although the commissioners charged with the task of creating the Convention on the HS did not give any thought to this proposition accepting instead that their task was to codify the existing law.⁵¹ The

⁴⁷ YBILC 6th Session 1954, A/CN.4/SER.A/1954/ Add.1 p7 UN Doc. A/CN.4/79.

⁴⁸ Rubin, above n 26 at p349.

⁴⁹ The Convention on the High Seas, 29 April 1958 450 U.N.T.S. 11 entered into force 30 December 1962.

⁵⁰ Rubin, above n 26 at p353.

⁵¹ 1 YBILC, 7th Session 1955 43 cited by Rubin, above n 26.

articles on piracy adopted into the 1958 Convention on the High Seas were further adopted into the UNCLOS in 1982 as articles 100 -107. Somalia ratified the UNCLOS as has been discussed at Chapter 3; therefore, this definition is applicable to Somalia. As a party to the UNCLOS it is implied that Somalia will criminalise the act of piracy. Somalia, having been involved in civil war and unrest without an effective government for more than 23 years, has not criminalised this definition.⁵² The UN has pressured Somalia to speed up the process of criminalisation. Other States have also been encouraged to criminalise piracy.⁵³

⁵² Legislative Decree No. 5 Of 16 December 1962.Somalia

⁵³ *United Nations Security Council Resolution SC Res. 2125 S/RES/2125 (2013)* operative article 4.

20.1 Do the skiffs used by the Somali pirates qualify as 'private ships' under the UNCLOS

There is no definition of 'ship' under the UNCLOS.

The SUA Convention⁵⁴ under Art 1 and Art 2 defines a ship as

'...a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft.'

The Harvard Draft Convention went to the trouble of defining a ship as '...any water craft or aircraft of whatever size.'⁵⁵ The Comment on draft Art 1 indicated that it was convenient to have a term that covered all the means of transportation by sea that could be used for piratical purposes. 'Ship' was selected as the natural word as the term pirate is synonymously linked to the term 'ship' in both history and fiction.⁵⁶ However this definition did not make it into the High Seas Convention of 1958⁵⁷ and consequently was not incorporated into the final version of UNCLOS. UNCLOS does however define a pirate ship as a,

'Ship being intended by the persons in dominant control to be used for the purpose of committing one of the acts in Art 101.'

This, however, still does not define a ship.

Geiß and Petrig suggest that the lack of specific requirement regarding the size of the offending ship is based more around the concept of the freedom of navigation on the HS found in Part VII, Art 87(1)(a). Art 90 supports the right of navigation on the HS. Art (87)(1)(a) is only one of six articles regarding freedoms on the HS, albeit the first of those articles. They therefore argue that skiffs used by Somali pirates are capable of interfering with navigation on the high seas and thus could well be included in the description of a ship.⁵⁸ If the sole

⁵⁴ Convention for the Suppression of Unlawful Acts, above n 4.

⁵⁵ Harvard Draft, above n 44 Art 1(5).

⁵⁶ Report of the International Law Commission to the General Assembly, Seventh Session, Comment to Article 1, 2Y.B. Int'l L.Comm'n 25 (1955) at para 5.

⁵⁷ League of Nations, above n 43.

⁵⁸ Geiß and Petrig, above n 34 at p62.

purpose of Part VII related to the freedom and right of navigation on the HS then this could be a valid argument. The aim of piracy from the earliest days was about the acquisition of property by force, not solely about freedom on the HS.⁵⁹

The ILC⁶⁰ report in discussing what type of vessel could commit piracy declared that merchant vessels only could commit piracy not warships. While it is accepted that the term merchant vessel is used to distinguish it from a warship, this would indicate the focus of the ILC was on vessels capable of carrying freight or commercial loads, as opposed to the smaller skiffs used by the Somali pirates.

The International Convention for the Safety of Life at Sea, 1974 (SOLAS) has a variety of descriptions for a ship under Annex, Chapter 1 Part A Regulation 1

(f) A passenger ship is a ship which carries more than twelve passengers.

(g) A cargo ship is any ship which is not a passenger ship

(h) A tanker is a cargo ship constructed or adapted for the carriage in bulk of liquid cargoes of an inflammable nature.

(i) A fishing vessel is a vessel used for catching fish, whales, seals or walrus or other living resources of the sea.

(j) A nuclear ship is a ship provided with a nuclear power plant.⁶¹

The first point to note is that these definitions apply to 'ships engaged on international voyages'.⁶² International voyages are described as those voyages that leave a port of a signatory to the convention and travel to a port outside that country or vice versa.⁶³ Two points here that would exclude this from applying to Somali pirates, Somalia is not a signatory to the convention. Secondly, there

⁵⁹ Rubin, above n 26 spends the first 70 pages of his work discussing the relationship between piracy and property, generally asserting that piracy as more to do with property and its ownership than any other central concept. At p71 Rubin states that the Admiralty courts used the term 'piracy' when disposing of claims to title by privateers who were seeking ownership of goods recaptured from foreign sovereign ships.

⁶⁰ Report of the International Law Commission, above n 56 at para 3.

⁶¹ The International Convention for the Safety of Life at Sea 1974 UNTS Vol 1184, I-18961 entered into force 25 May 1980.

⁶² SOLAS above n 61 Annex, Chapter 1 Reg. 1(a).

⁶³ SOLAS above n 61 Annex, Chapter 1 Reg. 1(d).

would be difficulty in making the case that the intention of the pirates is to travel to another port outside their country when the evidence suggests that the pirates return to Somalia and hold captured vessels there.⁶⁴ The definition of a 'fishing vessel' does not describe a 'ship' but a 'vessel' and the definition of piracy relates to 'ships'.

While SOLAS is designed to set standards for particular types of vessels and not to create an international definition of 'ships' it does assist with attaining a view point on how 'ships' are viewed at international law.

This leaves the conclusion that the skiffs⁶⁵ used by the Somali pirates do not come under the classification of a 'private ship'.⁶⁶ This does not exclude the

⁶⁴ J Ashley Roach Piracy Off Somalia, the Challenges for International Law, 103d Annual Meeting of the American Society of International Law (26 Mar 2009), at p75, that indicates that hijacked ships are moored along the Somali coast.

⁶⁵ A ship is defined in the Webster Universal Dictionary 65 1968 as, 'Any large vessel used for navigating the sea, propelled by sails, steam, or other mechanical means.' This would seem to discount the skiffs utilized by the Somali pirates as being described as private ships as their vessels, in the same publication, are described as, 'A light rowing or sculling boat, usually for a single rower or sculler.' It could be argued that a dictionary has no place as a source of international law as sources are well covered by Art 38(1) of the Statute of the International Court of Justice as being international conventions, international custom, the general principles of law recognized by civilized nations and lastly judicial decisions and the teachings of highly qualified publicists. However, that would depend on whether you argued that piracy exists or not at international law. There is debate as to whether piracy is in fact an international crime. The drafters of the Harvard Draft convention felt,

'...as there was no international agency to capture and no international tribunal to punish them, it could not be said that piracy was an offence by the law of nations.' Harvard Draft above n44 at p756'

This was the orthodox view. The unorthodox view held that there is an international law, but the international community left it to states to punish offenders. Harvard Draft above n23 at p752. Guilfoyle argues that piracy has always been an international crime enforced by national laws. He supports his argument by suggesting that UNCLOS is a narrower definition of piracy than customary international law and since the law of piracy has been codified under UNCLOS this overrides customary international law. (Treaty Jurisdiction over Pirates: A Compilation of Legal texts with Introductory Notes Prepared for the 3rd Meeting of Working Group 2 on Legal Issues, The Contact Group on Piracy off the Coast of Somalia Copenhagen, 26-27 August 2009.) Brownlie would argue that 'even where a treaty rule comes into being covering the same ground as a customary rule, the latter will not be simply absorbed within the former but will maintain its separate existence.' Brownlie, above chapter 2 n60 at p 96 citing the *Nicaragua* case as support. (ICJ Reports, 1986, p14).^{will}

'mother ships' used by the pirates as being classified as pirate ships or private ships. Pirates on board skiffs have conducted the attacks on merchant ships off the coast of Somali.⁶⁷

The court in *United States v Said* No 10-4970 (4th Cir. Argued Mar 25, 2011) above examined this question at some length as the defence was arguing that the 'law of nations' found under Title 18 U.S.C. §1651 did not apply in the current day. Judge Raymond Jackson at p563 – 566 carries out a comprehensive examination of the current scholarly works related to the definition of piracy. His finding at note 14 pg 566 is'

'Additionally there is no single court that can bring order to various interpretations of the UNCLOS. Rather, enforcement actions against pirates and criminal prosecutions of pirates are left to individual countries, many of which have different penalties for the crime of piracy ranging from three years to life in prison. As one scholar notes, (Joshua Goodwin "Universal Jurisdiction and The Pirate: Time for an Odd Couple to Part" 2006 39 Vand. J. Transnat'l L. 973 at p1000), "to claim there is a common definition may be correct in the sense that there is a definition of piracy in the UNCLOS, but the interpretation of that definition can potentially vary greatly between states.'

⁶⁶ Tullio Treves "Piracy, Law of the Sea, and the Use of Force: Developments off the Coast of Somalia" 2009 20(2) E. J. I.L. at p402.

⁶⁷ Milena Sterio "Fighting Piracy: why more is needed" 2009-2010 33 Fordham Int'l L. J. 37; at p383. International Chamber of Commerce, International Maritime Bureau Piracy and Armed Robbery Against Ships Annual Report (2009) at p3.

20.2 Is there a difference between private and public ends?

There has been discussion of the private ends requirement over a significant number of articles.⁶⁸ There are two schools of thought on the subject. One is that the private ends distinguishes it from public ends or governmental action,⁶⁹ the other is aimed at political ends⁷⁰ in the case of terrorist type groups.⁷¹ Terrorist acts, which have as their basis the intent to coerce a government or to terrorize a population and are in intent and motivation, political.⁷² It has been argued that the inclusion of the phrase 'for private ends' (Art 101a) was to separate the actions of pirates from civil war insurgents.⁷³

The actions of the Sea Shepherd vessels in *Cetaceans v. Sea Shepherds* were categorized as piratical as they lacked the necessary political intent to exempt them from the definition of piracy.⁷⁴ The court viewed the actions of the *Sea Shepherd* as private ends in that they encompassed 'personal, moral or philosophical grounds' and not political motivation.⁷⁵ The *Sea Shepherd* ships were conducting operations in the Southern Ocean aimed at stopping the Japanese government from conducting whale hunts that were supposedly scientific whale research, (since refuted by ICJ⁷⁶). The actions of these ships included crashing into whaling ships and general harassment by smaller inflatable craft. These actions forced changes in direction on the whaling ships as well as slowing their progress.

⁶⁸ D Doby "Whale Wars: How to End the Violence on the High Seas" 2013 44(2) Journal of Maritime Law and Commerce at p145 fn59 covers a broad spectrum of opinion as to what constitutes 'private ends' and 'public ends'.

⁶⁹ Sterio, above n 67 at p467

⁷⁰ J Peppetti "Building the Global Maritime Security Network: A Multinational Legal Structure to combat Transnational Threats" 2008 55(73) Naval Law Rev 9; at p92.

⁷¹ Sterio, above n 67 at p467.

⁷² U.S.C. § 2331 (1)(A)-(B)(iii) (2003) cited by Nicole Stilwell "Robbers or Robinhoods?: A Study of the Somali Piracy Crisis and a Call to Develop an International Framework to Combat Maritime Terrorism" 2009 7 Loy. Mar.L.J. 127 at p128.

⁷³ Guilfoyle, above n 35 at p33.

⁷⁴ *Inst. Of Cetacean Research v. Sea Shepherd Conservation Soc'y* 2013 WL 673712 (9th Cir February 25 2013)

⁷⁵ At p5, paragraph 1.

⁷⁶ *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* Judgement of 31 March 2014. p233 paragraph 67.

The decision in *Castle John v NV Mabeco* held that the actions of the Greenpeace activists in stopping vessels from dumping pollution was piracy as the actions were described as private even though it related to an ostensibly political issue.⁷⁷

Kontorovich argued that the actions of the Sea Shepherd were private actions in order to distinguish the actions from a state sponsored or owned vessel.⁷⁸ Heller argued that the political motivation of the group, took them outside the realm of piracy, as their intention was political.⁷⁹ However, it was agreed by the two scholars that their actions would meet the requirements for their actions to be criminalized as acts of violence at sea under the SUA Convention.⁸⁰

With regard to the instance of Somali pirates if the intention was to recover the money that was lost by individual fishermen, then the action is for their benefit. This makes it a private ends intention and not a public one. If the ships stopped were the ships that had been taking fish, allegedly illegally, and a 'tax' was taken that was paid, to the government or the local licensing authority, for the fish that had been taken, then they would not be pirates.

It is possible that the actions of the Somali fishermen, turned pirates, have used the contention that they are acting on behalf of the government to protect their access to fishing grounds and to prevent hazardous waste dumping could be acting as privateers of old who carried letters of marque and reprisal on behalf of the government of the day to recover property taken by pirates or other privateers acting for foreign governments. Sovereigns, to fulfill a range of obligations, instituted the practice of privateering. The practice was designed to recover goods taken by other privateers who were acting for foreign sovereigns,

⁷⁷ *Castle John v NV Mabeco* 77 ILR 537 (1986)

⁷⁸ Eugene Kontorovich "Yes, Sea Shepherd Engages in Piracy Under International Law" (2013) United States of America.

⁷⁹ Milena Sterio "The "Private Ends" Requirement of UNCLOS in the 9th Circuit: Are Sea Shepherds Pirates?" (2013) United States of America

⁸⁰ SUA Convention, above n4, Art 3(1)(c) which relates to causing damage to a ship which endangers safe navigation of that ship, or Art 3(3) which relates to threats to juridical persons, with the intention of compelling that person to do or refrain from doing any act to commit offences set out in Art 3(1)(b)(c) and (e). Although it is interesting that (d) is missed out as this relates to placing bombs or similar on a ship.

but only to the value of the goods seized,⁸¹ to bolster naval forces in times of war without the expense of building naval vessels, and to disrupt the commerce of other states either during times of war or to improve the strength of commerce for themselves.⁸² Issuing letters of marque ceased with the Declaration of Paris (1856) that banned the concept.⁸³ However like all treaties, it is only applicable to those who signed it and the US declined to sign it and Somalia did not exist at law at the time so could not be bound by it. It could be argued that the Declaration has become CIL, however countries that were signatories to it have continued issuing letters of marque to privateers.⁸⁴

Somali pirates might be justified in their actions against IUU fishing vessels and vessels dumping hazardous waste. It would be difficult for them to claim they were operating under a letter of marque as there is no functioning government to issue the letters or licence and certainly, while there may be some justification for attempting to retrieve goods, in this case illegal fish catch, they would be hard pressed to justify their actions in taking large commercial vessels for ransom to cover their loss. It would require the establishment of a Somali 'prize' court to adjudicate the value of the goods seized and some form of evidentiary proof that the pirates/fishermen had fish catch to the value claimed.

Bellish argues the case of Somali pirates who have declared their intentions in boarding vessels as political ends to stop illegal fishing and hazardous waste dumping.⁸⁵ To qualify as political ends the Somali pirates would need to be seeking to use their actions to change the government or for some other very

⁸¹ Rubin, above n 26 at p47.

⁸² Alexandra Schwartz "Corsairs in the Crosshairs: A Strategic Plan to Eliminate Modern Day Piracy" 2010 55 N.Y.U.J.L & Liberty 500 at p 510.

⁸³ 1856 Paris Declaration, above Chapter 3 n 139, signatories included Austria, Hungary, France, the Ottoman Empire, Prussia, Russia, Sardinia.

⁸⁴ Schwartz, above n 82 at p512 who cites Spain and England as two countries who continued issuing letters of marque as late as the end of WWII. Todd Hutchins "Structuring a Sustainable Letters of Marque Regime: How Commissioning Privateers can Defeat the Somali Pirates" 2011 99(3) C.L.R. 81; at p857 claims that the use of letters of marque by France and Britain during the American Civil War showed that these states did not believe the Declaration had created CIL.

⁸⁵ Jon Bellish "More Great Piracy Facts in U.S. Courts: Private Ends Edition" (2013) Oxford. This categorization would bring the Somali pirates under the SUA convention and in doing so would limit, first the parties able to detain them, signatories to the convention only, and the extent of universal jurisdiction applicable to detain them.

similar political ends. That they disagree with foreign fishing vessels taking their fish without licenses does not qualify their actions as political.

Gardner argues that the distinction should not be between 'private' and 'political' but private and 'public' which would prevent the concoction of perhaps spurious claims that actions are based on political motives.⁸⁶

⁸⁶ Maggie Gardner "Piracy Prosecutions in National Courts" 2010 10 J. I. C. J. 797 at p812.

20.3 Why should piracy be a crime?

For a behaviour to be criminalised it must meet two main criteria; it must be sufficiently serious to warrant intervention by the state and secondly it must be shown that criminal law offers the best method of regulation.⁸⁷ Feinberg offers four possible grounds for the establishment of the seriousness of the crime, harm to others, offence to others, immorality and harm to self.⁸⁸ It is suggested that piracy falls under the first of these four headings, harm to others.

The principle that supports the intervention of the state in cases where harm to others is the justification is based on the philosophy of John Stuart Mill. This states,

‘That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.’⁸⁹

From a Somali perspective the criminalisation of piracy is a legal extension of the moral law of Islam. While it is not expressly stated it is implied in both the verses,

“...and you should forgive and overlook: Do you not like God to forgive you? And Allah is the Merciful Forgiving.”⁹⁰

“Woe to those...who, when they have to receive by measure from men, they demand the exact full measure, but when they have to give by measure or weight to men, give less than due.”⁹¹

Also explicitly stated in the hadith, the sayings of Muhammed,

⁸⁷ A. Simester and W. Brookbanks *Principles of Criminal Law* (3rd ed, Brookers, Wellington, 2007) at p720.

⁸⁸ J Feinberg *The Moral Limits of the Criminal Law* (Oxford University Press, New York, 1984 - 1988) cited by Simester A P., and Brookbanks W.J., above n87 at p720.

⁸⁹ John Stuart Mill *On Liberty* (Penguin, London, 1985), at p68.

⁹⁰ Qur’an (Surah 24, “The Light” v.22)

⁹¹ Qur’an (Surah 83, “The Dealers in Fraud,” vv. 1-4)

“As you would have people do to you, do to them; and what you dislike to be done to you, don’t do to them.”⁹²

Which could well be summed up as ‘do no harm.’

It would seem that there is sufficient harm occurring to justify the criminalisation of piracy by states as part of their domestic law. The problem arises when that crime meets Rule of Law Constraints.⁹³ These constraints are that there should be no conviction without criminalization, no retrospective criminalization, fair warning and fair labelling.⁹⁴

Andreas and Nadelmann would argue that piracy is criminalized through the process of global prohibition.⁹⁵ The process of global criminalization has five stages, the legitimate use of the activity, the redefinition of the activity as a problem and an evil, the activation for the suppression and criminalization of the activity, the criminalization of the activity through conventions and the role of institutions on a global scale. Piracy has been through all of these phases, especially in relation to the Barbary Coast corsairs. While the practice of privateering and piracy were legitimated by the strong European powers there wasn’t a problem. Piracy became a problem when commerce was interrupted in a way that negatively affected those strong powers.⁹⁶ The expansion of the British navy to protect the far-flung reaches of the British Empire increased its ability to reinforce the view that piracy was no longer considered a legitimate activity.⁹⁷ This British view was exported to its colonies and neighbouring States as increasing order came to international relations.⁹⁸ This gradually led to an international consensus that piracy was an affront to good order on the high seas and the outlawing of the activity. That piracy was not codified until the 1958 Convention on the High Seas possibly reflects the view that there was no need

⁹² Kitab al Kafi vol.2 p146.

⁹³ Simester and Brookbanks, above n 87 at p735.

⁹⁴ At pp24–30.

⁹⁵ Peter Andreas and Ethan Nadelmann Policing the Globe: Criminalization and Crime Control in International Relations (Oxford University Press., New York, 2006) at p22.

⁹⁶ Andreas and Nadelmann, above n 95 at p 23.

⁹⁷ At p23.

⁹⁸ At p25.

for a convention as the activity was held to be universally abhorrent or the crime had fallen into disuse.

That this can be claimed is possibly due the spread of colonisation throughout the world as part of the British Empire and the empires of other European States. It was the view of the mother countries that piracy was an international wrong and needed to be prohibited to allow for the safe transport of resources from the colonies back to their mother countries. This created some confusion as to what exactly piracy was.⁹⁹ By the time of the 1960s when colonies were gaining independence the colonial powers had already established the international rules and the freshly independent States were left with no say as to how those rules would be framed. It could be argued therefore that piracy was only a crime as far as the limited international community of colonisers went and not the rest of the world who ratified pre existing conventions that criminalised the behaviour.

Obokata shuns the criminal approach by viewing piracy from a human rights perspective.¹⁰⁰ He takes a victim centred approach and argues that there is ground for States to pursue the pirates based on their violation of international human rights norms. He supports his argument on the basis that the Human Rights Committee has argued that States have a responsibility to pursue those private persons who would restrict the enjoyment of rights between private persons and to take appropriate measures to prevent, investigate and redress the harm or punish those responsible.¹⁰¹ While this approach is laudable, it is not feasible when the current situation in Somalia is taken into account. The lack of functioning government and investigatory processes would make it difficult to track and bring to justice the offending pirates.

⁹⁹ Guilfoyle, above n 35 at p29 fn13 citing various sources including Oppenheim, HDC and Rubin as to the inclusion of *animus furandi* as an element of piracy.

¹⁰⁰ T Obokata "Maritime Piracy as a Violation of Human Rights: A Way Forward for its Effective Prevention and Suppression" 2012 International Journal of Human Rights

¹⁰¹ Obokata, above n 100 at p8 citing General Comment No 31 (The Nature of the General legal Obligations Imposed on States Parties to the Covenant)(2004), CCPR/C/21 Rev.1/Add 13, para. 8.

20.4 What empowers the International Community to respond?

There are two possible answers to this question. The United Nations Security Council has declared the situation in Somalia a threat to regional peace and security. In a range of Security Council Resolutions the UN has urged States to cooperate in a 'comprehensive response to repress piracy.'¹⁰² This requirement to cooperate is also found in the UNCLOS Art 100. The focus here is the direction to,

'...cooperate to the fullest possible extent... on the high seas or in any other place outside the jurisdiction of any State.'¹⁰³

There is no indication as to what the term 'fullest possible extent' should entail. It has been suggested that this direction is so broad that any 'measure' that could be taken by a State, should an opportunity arise, and the State fails to take that opportunity, is in breach of this article.¹⁰⁴

To answer this question it is important to look at the response of the International Community as a whole as exemplified through United Nations Security Council Resolutions and draw a comparison between the levels of effort exerted.

It is important to separate the incidents of piracy from the continuing situation in Somalia. The United Nations Security Council in its resolutions regarding Somalia states quite clearly that the action taken under Chapter VII relates to the situation in Somalia as being the threat to peace and security in the region. That is, the lack of a functioning government and the humanitarian situation coupled with the perpetuation of violence by armed militia groups and the attempts at disarming and demobilizing those groups.¹⁰⁵ The UNSC is addressing this situation under Chapter VII and not the incidents of piracy.

¹⁰² UNSCR 2125 above n 52 Operative Article 3 as an example.

¹⁰³ UNCLOS Art 100.

¹⁰⁴ Roger Middleton *Pirates and How to Deal With Them*. (Chatham House, London, 2009) at p6.

¹⁰⁵ *United Nations Security Council Resolution SC Res. 1801, S/RES/1801 (2008)* Preamble.

UNSC Res 1851(2008) invites States to embark law enforcement officials, (shipriders), to facilitate the investigation and prosecution of suspected pirates.¹⁰⁶ It is to be noted here that this invitation is quite possibly *ultra vires* as it breaches the UNCLOS Art 92(1) requirement for ships to sail under one flag only. Further discussion on this point is found under Shiprider agreements below. The real crux of this resolution is the willing breach of the sovereignty found under paragraph (6) in which authority is granted to take all necessary, appropriate measures ‘...in Somalia’ to suppress piracy and armed robbery. This action is conditional on a request from the TFG to the SC so there is consent required and States are restricted from acting on their own.

UNSCR 1897 (2009) in its preamble makes note of the actions of Kenya to prosecute suspected pirates. It also appears to support prosecution in one state and incarceration in another state for captured pirates.¹⁰⁷ It is quite apparent that such a wide-ranging statement allows for the possible breach of a vast number of international human rights,¹⁰⁸ see discussion below. This preambular statement is given operative authority under paragraph 12.¹⁰⁹ Paragraph 6 is confused between a military action and a police action as it starts with a ‘fight’ against piracy and then goes on to speak of ‘custody of pirates’, ‘law enforcement officials’ and ‘investigation and prosecution of persons detained’. Paragraph 7 follows the precedent set in Paragraph 6 by using the term ‘fight’ three times. This would suggest a more militaristic approach than a police action. Paragraph 12 seems to ignore any and all reference to the application of universal jurisdiction found in Art 105 of the UNCLOS that, regardless of scholarly debate

¹⁰⁶ *United Nations Security Council Resolution SC Res.1851* Chapter 2 n 166.

¹⁰⁷ United Nations Security Council Resolution S/RES/1897, preambular statement 9,
 ‘...to take steps to prosecute or incarcerate in a third state after prosecution elsewhere captured pirates consistent with applicable international human rights law.’

¹⁰⁸ See Is there an explanation for the apparent difference in treatment of the pirates? Below 3.7

¹⁰⁹ UNSCR 1897 paragraph 12,

‘Calls upon all States, and in particular flag, port and coastal States, States of the nationality of the victims and perpetrators of piracy and armed robbery, and other States with relevant jurisdiction under international law and national legislation to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law and international human rights law, to ensure that all pirates handed over to judicial authorities are subject to a judicial process, and to render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such as victims and witnesses and persons detained as a result of operations conducted under this resolution.’

to the contrary, confines the prosecution of pirates to the capturing State.¹¹⁰ UNSCR 1897 seems on the one hand to condone the cooperation of a range of States to investigate and prosecute pirates and makes broad ranging statements regarding international law without being specific about who has jurisdiction, as under Art 105 the UNCLOS, leaving a gap for the type of arrangements instituted by the UK and the US with Kenya.

There is no mention of capture and release at all or condemnation of those States that have chosen not to prosecute pirates, and indeed from the wording it seems to indicate that all pirates responsible should be prosecuted.¹¹¹ The next sentence in the same article only mentions 'all pirates handed over to judicial authorities.' It would seem that there is a gap where only a number of pirates are handed over to judicial authorities with no mention of what happens to those who are not handed over to judicial authority. If the intent of the Security Council was to bring to justice all the persons responsible then surely the covering statement must include words to the effect that 'all persons responsible for acts of piracy are to be handed over to judicial authorities'. This would close the gap where it is possible that some pirates may not be handed over, and instead be dealt with outside the bounds of the law. The inclusion of the term 'all persons' would reinforce the view that it is not just the pirates seizing ships, but those providing finance and handling the logistics as well that need to be brought to justice.¹¹²

¹¹⁰ Sterio, above n 67 at p391. Jarret Berg "You're Are Gonna Need a Bigger Boat: The Erosion of Customary Piracy Suppression." 2009 44 New Eng. L. Rev. 343 at p391 citing the *Report of the International Law Commission to the General Assembly 11 U.N. GAOR Supp. (No 9) U.N. Doc A/3159 (1956) at 283 (1956)* reprinted in [1956] 2 Y.B. Int'l L. Comm'n 283, U.N. Doc. A/CN.4/97, Eugene Kontorovich "International Legal Responses to Piracy off the Coast of Somalia" (Insights, 6 February 2009) <<http://asil.org/insights090206.cfm>>122. Geiß and Petrig, above n 34 refer to several works when the notion of this limitation on universal jurisdiction is discussed at p148 fn615.

¹¹¹ *United Nations Security Council Resolution 1918, S/RES/1918 (2010)* rectifies this oversight in the preambular statement as well as operative paragraph 1.

¹¹² Art 101(c) includes those who facilitate the crime as being pirates. This would include the suppliers of food for the hostages as well as those laundering money so would create quite a wide web of prosecutions.

The second answer is based on the concept of Universal Jurisdiction that is found in Art 105 of the UNCLOS. The opening sentence of this article is linked to Art 110 which provides a right of visit on the high seas to warships, (Art 110(1)), military aircraft, (Art 110(4)), and to any other ship or aircraft clearly marked and identifiable as being on government service, (Art 110 (5)). If there is going to be a seizure there must first of all be a bringing to stop of the target ship. It is in this area that these two articles are deficient. There is no mention of the level of force that may be exerted by the warship in order to detain the suspect pirate ship. It must be remembered that the action of bringing a suspected pirate ship to a stop is a police action and not an action of war, therefore the use of force must be considered.¹¹³ Middleton states that Art 110 provides the legal basis for the use of force for this purpose and that customary international law describes the acceptable amount of force. The *M.V. Saiga No 2* judgement held that,

‘... within international law the use of force must be avoided as far as possible and where force is inevitable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.’¹¹⁴

Treves suggests that there is an emerging trend that permits the use of force as long as it is ‘unavoidable, reasonable and necessary.’¹¹⁵ It must be borne in mind that the ships being approached are only suspected of having committed the crime of piracy. It is safe to assume that hailing the ship by radio and the use of loud hailer would be acceptable.¹¹⁶ Priddy and Casey-Maslen¹¹⁷ argue that the use of force does not include warning shots across the bow of a ship to warn it off as the ruling in the *MV Saiga* held that warning shots were not a use of force against a person.¹¹⁸ The most informative report that we have regarding this type of

¹¹³ Middleton above n 104 at pp2-3.

¹¹⁴ *M/V Saiga*, Chapter 3 n 61 para. 155. This decision was built on two previous cases the *S.S. I'm Alone (Canada/United States)* U.N.R.I.A.A. Vol III at p1609 and the *Red Crusader (Commission of Enquiry), (Denmark-United States)* I.L.R. Vol. 35 p.485.

¹¹⁵ Treves, above n 66 at p414

¹¹⁶ At p414

¹¹⁷ Alice Priddy and Stuart Casey-Maslen “Counter Piracy Operations by Private Maritime Security Contractors: Key Legal Issues and Challenges” 2012 10 J.I.C. J. at p848.

¹¹⁸ *MV Saiga*, above Chapter 3 n 61 §156.

situation is that of the ship *INS Tabar*.¹¹⁹ The *Tabar* was on patrol and fired on a suspected pirate 'mother ship'. Unfortunately, the ship was the Thailand fishing boat *Ekwat Nava 5* which had been taken by the pirates days earlier. The pirates escaped but 14 of the boats' crew died in the incident. There is a report from the crew of the *Tabar* that suggests that the pirates on board the Thai fishing vessel fired on the *Tabar*.

Art 105 of UNCLOS provides for the States to seize a pirate ship and arrest the persons on board as long as the vessel is on the HS. States are not directed to act but are given the option, as the wording used is 'may seize'. This would seem at odds with the claim that piracy is of such a heinous nature as to attract the sobriquet of '*hostis humani generis*'. If piracy were truly a crime of this nature, a threat to all mankind, then the drafters of the article would have included the term 'shall seize' leaving no option for States. Guilfoyle highlights the fact that unlike other treaties, such as the SUA Convention, the UNCLOS does not contain a prosecute or extradite clause¹²⁰ which would create a duty for apprehending states to either prosecute the pirates themselves or extradite them to a state that has sufficient nexus to prosecute under the principles mentioned above, territoriality, nationality etc. Gardner suggests that the use of the term 'may' is not designed to limit universal jurisdiction, rather, when associated with the right to seize, is a geographical limitation to prevent the exercise of jurisdiction in the waters of a state.¹²¹ While it is logical to follow that line of reasoning there is no support for the contention that it expands the exercise of jurisdiction to third states beyond the capturing state. Kontorovich is an ardent supporter of the contention that the exercise of judicial jurisdiction is limited to the capturing state.¹²²

¹¹⁹ M Valencia and N Khalid *The Somalia Multilateral Anti-Piracy Approach: Some Caveats* (Nautilus Institute Australia, 2009) at p4.

¹²⁰ Douglas Guilfoyle "Prosecuting Somali Pirates: A Critical Evaluation of the Options" 2012 10 JICJ at p775.

¹²¹ Gardner, above n 86 at p 805. To support her argument Gardner cites the 1956 ILC report to the UN, Report of the ILC to the General Assembly UN Doc. A/3159, 1956 UN Yearbook of the ILC 253, 283 where it states that "This right cannot be exercised at a place under the jurisdiction of another State."

¹²² Kontorovich, above n 110 at p2.

21 Regional Responses to Piracy.

The Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, (Djibouti Code of Conduct), was formulated in response to Art 100 of the UNCLOS that calls on States to cooperate in the repression of piracy.¹²³ The General Assembly of the United Nations in its resolutions calling for cooperation and the call by the IMO to develop a regional agreement of cooperation supported the creation of the Djibouti Code of Conduct.

Art 4(6) establishes the authority of the seizing participant State to take jurisdiction over the persons seized for committing acts of piracy. Art 4(7) establishes the right of the seizing participant state to waive the exercise of jurisdiction and authorises the passing of jurisdiction to any other participant to enforce its laws against the pirate ship or persons on board.

The interesting aspect of these two articles is the use of ‘participant’ as opposed to the more common signatories or parties to the agreement.¹²⁴ By using the term participant it opens up the passing of jurisdiction to States that attended the conference where the Code was drafted which includes the following non regional States; Canada, Iran, India, Indonesia. Italy, Japan, Nigeria, Norway, Philippines Singapore, United Kingdom and the United States. This opening up of jurisdiction raises the possibility that a State that has no nexus at all to the ships involved or the crews or cargo on board, that hasn’t been involved in the seizure of the ship, taking jurisdiction. It can be assumed that this measure does away for the necessity of MOU and bi-lateral agreements to be signed and the necessity for extradition from one State to another and creates for the suspected pirate the possibility that he could be transferred from one state to another without any

¹²³ The Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden, signed 29 January 2009, Djibouti, effective 29 January 2009.

¹²⁴ While the Djibouti Code of conduct is not currently binding, the aim, as expressed in Art 2.2, is to establish within two years a binding agreement.

real judicial oversight of the process. Chang argues that the main downfall of this agreement is that it is not legally binding.¹²⁵

21.1 Memoranda of Understanding.

While not universal in scope, Memorandum of Understanding (MOU) have been signed between several States involved in the pursuit of pirates and regional countries such as Kenya, Mauritius, The Seychelles, Somalia and the United Republic of Tanzania.¹²⁶ These MOU provide for the prosecution of pirates captured by the naval forces operating in the GOA or Indian Ocean, in the territories of third States, which precludes the necessity of shipping the pirates back to the capturing State's courts for prosecution. The reasons cited for MOU are, cost considerations, abuse of asylum laws by suspects, evidentiary issues and political considerations.¹²⁷

There are two main views on these MOU. One is that they breach Art 105 the UNCLOS directive that the seizing State may decide on the penalties to be imposed. There is no mention under this article of another State contributing to the imposition of a penalty or deciding on the disposal or otherwise of the vessel concerned and its property, subject of course to the right of third parties, for example cargo owners, ship owners, charterers of the vessel and so forth. Indeed the strength of argument against MOU is found in the discussions held by the drafters of the article where it was expressly stated that the right to seize and adjudicate could not be exercised at a place under the jurisdiction of another state.¹²⁸ Greiß and Petrig¹²⁹ assert that the requirement of the seizing State to set the penalty confirms the view held by CIL that prosecution of pirates is conducted under domestic law and that the jurisdictional basis is the universality principle. It is possible however, that the second sentence in Art 105 does nothing more than establish the nexus by which the seizing State can

¹²⁵ Diana Chang "Piracy Laws and the Effective Prosecution of Pirates" 2010 33 B. C. Int'l & Comp. L. Rev. 273 at pp278-279.

¹²⁶ Shnider, above n 27 at p535.

¹²⁷ Ademun Ademun-Odeke "Jurisdiction by Agreement Over Foreign Pirates in Domestic Courts: In Re Mohamud Mohamed Dashi & 8 Others " 2011-2012 24(1) U.S.F. Mar.L.J. 35 at p40.

¹²⁸ Berg, above n 110 at p379.

¹²⁹ Greiß and Petrig, above n 34 at p151.

establish domestic jurisdiction over the prosecution of the pirate, an adjudicative jurisdiction. Treves holds that the use of MOU is nothing more than a 'fiction' when allegedly transferring the right to the prosecuting State.¹³⁰

¹³⁰ Treves, above n 66 at p402.

21.2 Is there a common definition of piracy amongst the States responding?

Once apprehended, pirates are under the jurisdiction of the apprehending State and that State's domestic law applies, should that State take up the option of prosecuting them.

The SG was requested by the Security Council to compile information received from Member States as to measures that had been taken to criminalise piracy under their domestic legislation.¹³¹ There were responses from 42 members outlining the measures taken and the current state of their legislation.¹³² Of those 42, seven States had imported into their legislation the definition of piracy from the UNCLOS, two had relied on referring to the Law of Nations, 30 had taken steps to either criminalise piracy as a separate domestic offence or utilised their existing domestic legislation for crimes like murder, robbery, aggravated robbery and damage offences. Three States had not domesticated the crime or were investigating how it could be achieved. The fact that only 30 states had criminalised piracy could indicate that the crime is no longer abhorrent as once thought or it is no longer viewed as *communis hostis omnium*.

While in no way complete this survey indicates that while states have ratified the UNCLOS, and there are assertions that the UNCLOS definition is now considered CIL, this may not be the case in practice.¹³³

Of the states that have developed their own legislation there are common themes of violence of some description required, some form of seizing, either of the ship or of the crew and instances where control of the ship in some form is required.

Examples of some form of violence are Germany, 'use of force or attacks' found in the German Criminal Code Section 316(c)(1)(b)¹³⁴ and Spain, Organic Law

¹³¹ *United Nations Security Council Resolution 2015* (2011) S/RES/2015 24 October 2011, paragraph 11.

¹³² Letter dated 23 March 2012 from the Secretary-General to the President of the Security Council S/2012/177.

¹³³ *United States v Hasan* No2:10cr56, 2010 WL 4281892 (E,D, Va Oct 29 2010) at paragraph 21.

10/1995¹³⁵ which States ‘Whoever using violence, intimidation’ as the introduction to the definition.

Germany uses the term ‘...in order to gain control of or influence the navigation of a ship...’ in the above section while the Czech Republic utilises the phrase, ‘Gaining control over civilian vessels...’ as the descriptive title for their Section 290 of Criminal Code N. 40/2009 Coll.¹³⁶

Spain uses the term ‘...seizes, damages or destroys a ship...’ to describe the necessary actions in the section mentioned above.

Australia, Finland, Malta, and the United Kingdom, have either imported directly the provisions of the UNCLOS definition and associated articles or make reference to the definition as constituting piracy in their jurisdiction.¹³⁷

Kenya as one of the States to the fore in piracy prosecutions has imported both the definition of piracy and the relevant articles from the SUA Convention in a recent overhaul of its legislation.¹³⁸ The issue that arises for Kenya comes from the Merchant Shipping Act No 4 2009 section 470(4) which expands the jurisdiction of the law regardless of where the offence takes place, where the ship is and whatever the nationality of the of the person committing the act. This creates for Kenyan courts the universality of their jurisdiction, a jurisdiction that may not be supported by the legislation of Kenyan courts to exercise.¹³⁹

¹³⁴ Criminal Code (Strafgesetzbuch, StGB) Section 316 (c)(1)(b).

¹³⁵ Organic Act 10/1995, 23 November 1995 Criminal Code (Ley Organica,Codigo Penal)

¹³⁶ Criminal Code Act 2009 (trestni zákonik).

¹³⁷ S/2012/177 above n 129 Annex.

¹³⁸ Merchant Shipping Act, Act No 4 of 2009

¹³⁹ James Gathii “Kenya's Piracy Prosecutions” 2010 104 Am. J. Int'l L. 416 at p426.

21.3 Conclusion

There are many issues surrounding the definition of piracy in international law and within regional and domestic law. There is a lack of conciseness in the drafting of the legislation that has not been fully challenged in the courts to remove the doubt and provide clarity. It seems that there is an easy approach taken to the domestic enactment of legislation for piracy by implementing straight from the UNCLOS Art 101 definition. This raises the definitional problems discussed above which need to be addressed at domestic level which does not rectify the issues at an international level. Domestic legislation that does not implement Art 101 from the UNCLOS creates its own issues by way of jurisdiction, breadth of coverage and location of the offences with some confusion still around whether crimes are robbery or piracy dependent on their location. This points to the necessity for a thorough overhaul of the definition of piracy last attempted under the 1932 Harvard Draft and 1958 Geneva High Seas Convention. While there was a view at the time that piracy was almost extinct and not worth worrying about, events that have transpired since the beginning of the century have brought a focus back to this ancient lifestyle. There is no indication that maritime piracy will vanish from the seas and therefore consideration needs to be given to updating and keeping current the law of nations and international law to ensure that prosecutors are fully equipped to bring to justice those who choose this lifestyle.

22 Is there an explanation for the apparent difference in treatment of the pirates?

There have been concerns raised about the treatment of pirates off the coast of Somalia and the possible breaches that maybe occurring to their rights either in the way they are detained or for the unfortunate few deprived of life by either armed forces action or by PMSCs.

International human rights are protected under a number of treaties that found their genesis in the Universal Declaration of Human Rights (UDHR) that was drawn up after WWII.¹⁴⁰ Art 3 gives a right to life, liberty and security of the person, Art 5 recognises a right to be free from torture, cruel, inhuman or degrading treatment or punishment. Art 9 recognises the right to be free from arbitrary arrest, detention or exile, while Art 10 recognises the right to a full and public hearing of any criminal charges against a person. The UDHR became the basis for the International Convention on Civil and Political Rights, (ICCPR)¹⁴¹ which in its turn became the basis for the African Charter on Human and People's Rights (Banjul Charter).¹⁴² The Somalis captured as part of the anti piracy operation off the coast of Somalia fall directly under the Banjul Charter while in Africa but are subject to other human rights conventions when taken on board naval ships from other countries. For example the European Convention on Human Rights¹⁴³ when the warship that captures them is from a European Navy, and if taken by the US Navy limited rights as found in the Constitution of

¹⁴⁰ Universal Declaration of Human Rights adopted 10 December 1948 and ratified on the 16 December 1949.

¹⁴¹ ICCPR adopted for signature 16 December 1966 entered into force 23 March 1976.

¹⁴² African Charter on Human and People's Rights adopted in Nairobi 27 June 1981, entered into force 21 October 1986.

¹⁴³ The Convention for the Protection of Human Rights and Fundamental Freedoms signed 4 November 1950, effective 3 September 1953, amended by Protocol No.11 (ETS no. 155) as of 1 November 1998. *Medvedyev and others v France* (3394/03) Grand Chamber 23 March 2010 at paragraphs 66 and 67, The crew were in French jurisdiction from the time the interception operation began, and not only when a boarding party took control of the vessel and its crew.

the United States and its amendments.¹⁴⁴ Other navies would be constrained by the ICCPR as long as their State is a signatory or has enacted its own human rights legislation. Under the ICCPR, Art 6 provides for an inherent right to life on the basis that it will not be arbitrarily taken from them, Art 6(2) covers the death penalty and its application only in cases of serious crimes. The death sentence may only be given as a sentence rendered by a competent court. Art 7 protects people from torture or cruel, inhuman or degrading treatment or punishment. The suspected pirates detained on board naval ships are possibly confined to limited cabin space until they are delivered to a jurisdiction where they can be brought before a court. There is no evidence to date that there have been any cases of pirates ill treated on their return to Somalia as part of the catch and release actions taken by naval forces that have apprehended them or that the conditions they are subject to amount to cruel or inhuman treatment. There have been claims by suspected pirates of ill treatment by prison authorities, lack of medical attention and lack of food.¹⁴⁵ These actions could amount to breaches under Art 7. This is also covered under Art 5 of the Banjul Convention. Both Kenya and Somalia have ratified the convention.

Art 9 ICCPR grants the right to be free from arbitrary arrest and detention. The power to arrest and detain persons on board private ships must carry with it a power to detain. While Art 105 UNCLOS provides a power to arrest the persons on board a pirate ship there is no mention of a power to detain those arrested persons and transport them to a court. While it could be implied that a power to arrest brings with it a complimentary power to detain, it is suggested that in the matter of a crime that is of such a serious nature as to warrant Chapter VII intervention by the UN, that a power to detain would be written into the

¹⁴⁴ The Constitution of the United States, Created 17 September 1787 and ratified 21 June 1788, The United States Bill of Rights ratified on the 15 December 1791. Douglas Guilfoyle "Counter-Piracy Law Enforcement and Human Rights" 2010 59(1) International and Comparative Law Quarterly at p155 ' In the relevant cases it has become common simply to refer to the extra-territorial power exercised over embassies and *flagged ships* and aircraft as clear cases where there is jurisdiction over persons therein. (Author emphasis added).

¹⁴⁵ Gathii, above n 139 at 432, Eugene Kontorovich "'A Guantanamo of the Seas": The Difficulty of Prosecuting Pirates and Terrorists" 2010 98 CLR at p266 citing incidents of torture and denial of religious privileges.

convention clearly. In other articles of the UNCLOS the power to detain is explicit in the article. Art 73 (4) states 'In cases of arrest or detention...', Art 97(3) clearly excludes both detention and arrest and both are explicitly mentioned. Arts 220(2) and 220(6) carry with them a clear power of detention. The powers to detain mentioned above in no way rise to the state of seriousness that is alleged to be attached to piracy. The drafters of the HDC included in the similar article to the UNCLOS 105, their Art 11(1), and included within it a power to stop the vessel.¹⁴⁶ Art 110 (1) the UNCLOS, provides a right to 'board only if there is 'suspicion' of the ship being engaged in piracy. While it has been said that the UNCLOS codified existing CIL, it would appear that this was not the case. To assert that CIL granted a right to detain would also open up the definition of piracy to include the necessary element of robbery that has long been associated with piracy.¹⁴⁷ The UNCLOS Art 110 creates a right of 'visit' or boarding, only, 'to be carried out with all possible consideration', (Art 110(2)). It is clear then that when the drafters of Art 105 created the power of seizure, if they felt a need to include a power of detention it would have been explicit and not implicit. It is possible that suspected pirates detained under UNCLOS have a right of claim for unlawful detention against those states that have either, arrested them and transported them to another State for trial, or have arrested, detained and then released them. Guilfoyle claims that this power of detention is 'likely' present through the mention in UN Security Council Resolution 1838 para 3 of the call to use 'necessary means...for the repression of...piracy' as it is a 'necessary' detention.¹⁴⁸ In other places Guilfoyle asserts that the phrase 'necessary means' is a euphemism for military force.¹⁴⁹ It is suggested that the power to detain pirates must be contained in the laws of the State making the apprehension and

¹⁴⁶ Harvard Draft Convention above n 44. This did not make it into the Geneva Convention on the High Seas. From the comments following the article in the HDC this right to stop a ship was seen as an affront to the sovereignty of the flag State on one level, (2 Moore Digest International Law Section 318 p.918) and at another level similar in context to conducting a search to gain evidence on which to base a search for evidence that it is a pirate ship (Wharton, Digest of Int'l Law (2nd Ed) Vol. III, p 169-171,) cited in the commentary to the HDC articles.

¹⁴⁷ Rubin, above n 26 pp50-1.

¹⁴⁸ Guilfoyle, above n 144 at p159.

¹⁴⁹ Douglas Guilfoyle "Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter Piracy Efforts" 2008 57 International and Comparative Law Quarterly 690 at p695. Such a broad expanse of the use of the phrase 'necessary means' renders it almost meaningless.

specifically granted to the Captain of the Naval ship making the arrest.

Art 9(2) ICCPR provides for the informing of the detained person for the reasons for their arrest and Art 9(3) for the person to be brought promptly before a judge or other officer of the court and entitled to a trial within a reasonable amount of time. There is no definition of promptly in the ICCPR to provide a guideline. The ECtHR has held in *Medvedyev v France*,¹⁵⁰ a case where the detained person was intercepted on the HS on suspicion of drug smuggling, that detention for 13 days on board ship did not breach the similar article of the European Convention on Human Rights,¹⁵¹ (ECHR), Art 5(3). The claim in the *Medvedyev* case was that in the circumstances it was 'materially impossible' to avoid the 13 days detention on board ship. The court found that the detention had violated Art 5(1) of the ECHR. *Medvedyev* also looked at the extra jurisdictional application of ECHR to cases of interdiction on the high seas.¹⁵² The end result of the courts discussion was that exercise of coercive law enforcement jurisdiction over a foreign vessel on the HS brings with it ECHR jurisdiction.¹⁵³ The partly dissenting judgment of Judges Tulkens, Bonell, Zupančič, Fura, Spielmann, Tsotsoria, Power and Poalelungi found at para 13 that there was a lack of placement of the suspects under judicial control, which would not have breached Art 5(1).

¹⁵⁰ *Medvedyev and others v France*, above n 143 at paragraphs 66 and 67.

¹⁵¹ European Convention on Human Rights

¹⁵² ECHR Art 5(1) states;

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

1. the lawful detention of a person after conviction by a competent court;
2. the lawful; arrest or detention of a person for non-compliance with a lawful order of a court or in order to secure the fulfillment of an obligation prescribed by law;
3. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
4. the detention of a minor by lawful order for the purpose of educational supervision of his lawful detention for the purpose of bringing him before the competent legal authority;
5. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
6. the lawful arrest or detention of a person to prevent his unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

¹⁵³ Douglas Guilfoyle "ECHR Rights at Sea: *Medvedyev and others v. France*" 2010 EJIL:Talk E. J. I. L.

In the *Cygnus* there was a 40-day delay between seizure of the defendants by Danish navy and being brought before a court in Rotterdam.¹⁵⁴ The defendants in that case were five Somali nationals responsible for firing on a Netherlands-Antilles registered vessel, the *Samanyolu*. The defendants were held on board the vessel without formal arrest or charge from the 22 January 2009. The defendants were transferred, without extradition process, from Danish custody to Dutch custody on the 10 February 2009. On the 11 February 2009 the defendants were finally brought before a court and had legal assistance assigned to them. The judge in the matter agreed that there was a breach of Art 5(3) of the ECHR but the ‘exceptional circumstances’ of the case, that is operational reasons, justify the finding that the lengthy period of detention without charge and formal arrest did not prejudice the defendants. From *Medvedyev* to the defendants in *Cygnus*, the time span has extended from 13 days to 40 days of detention without there being any prejudice to the defendants right to a ‘prompt hearing’. In matters brought before the ECtHR that were not based on apprehensions at sea the maximum appears to be 4 days between detention and ‘prompt appearance’.¹⁵⁵ As discussed below, in a technologically advanced world, this seems incomprehensible. In the *Cygnus* the Judge offered the solution of video conferencing as a means of arranging a ‘prompt appearance’.¹⁵⁶ At what point does the breach of the suspect’s human right, not to be deprived of their liberty, become sufficient to trigger a dismissal of the case for circumstances beyond the exceptional?

There is also the matter where suspected pirates are detained and released without trial. For a period of time they are deprived of their liberty, in breach of Art 9(1) ICCPR, and Art 5(1) (ECHR), and finally released.¹⁵⁷ The reasoning behind the release of the pirates in the *Absalon* case, discussed by Guilfoyle

¹⁵⁴ *Cygnus* (10/6000012-09) 17 June 2010.

¹⁵⁵ Andrew Ashworth Human Rights, Serious Crime and Criminal Procedure (Sweet and Maxwell, London, 2002) at p 29 citing *Brogan v UK* (1989) 11 EHRR 117 and *Brincat v Italy* (1993) 16 EHRR 591.

¹⁵⁶ *Cygnus* above n 154 at p500.

¹⁵⁷ ‘Danes free pirates from navy ship’ Lloyd’s List (London 26 September 2008), cited in D Guilfoyle “Counter Piracy, Law Enforcement and Human Rights.” 2010 59 International and Comparative Law Quarterly 148 at p142.

above, was because the Danes could not find a way to successfully prosecute them. In favour of the Danes was they had decided not to release the suspects to Somali authorities because they could risk torture or death.¹⁵⁸

The decision not to release the pirates back to the Somali authorities could also be based on the principle of non-refoulment. The principle of non refoulment is enshrined in the 1951 Convention Relating to the Status of Refugees¹⁵⁹ Art 33 and in the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) Art 3(1).¹⁶⁰ This principle of international law stops the rendering of a persecuted person to their persecutor in other words the expulsion, extradition, deportation; return or otherwise removal to a country where the person involved faces a risk of persecution or serious harm.¹⁶¹ Non-refoulment is different to political asylum as the persons under non-refoulment are more often than not refugees being sent back to disaster or war zones and are not in fear of persecution based on their race, social group or class. While this is a laudable move doubt must be cast on the motive, as the State of Somalia at that time, 2008 was still in a state of disarray and would not have functioning courts or Police to release the prisoners too. Art 5(5) of the ECHR provides for those detained and released in contravention of the provisions of the ECHR Art 5 has an enforceable right to compensation. Art 9(4) ICCPR provides the right for a detained person to challenge the lawfulness of their detention and Art 9(5) grants the right to compensation if the arrest or detention is proven unlawful.

ICCPR Art 9(3) specifies that persons awaiting trial shall not be detained in custody. From the claims made by the suspected pirates held in Kenyan custody, it appears that this is indeed the general practice. The rationale behind holding

¹⁵⁸ Treves, above n 66 at p408. Although as stated above there have been no credible instances of released pirates being victimised by the Somali population or government authorities.

¹⁵⁹ United Nations Convention Relating to the Status of Refugees (entered into force 28 July 1951).

¹⁶⁰ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment U.N. Doc A/Res/39/708 (signed 10 December 1984, entered into force 26 June 1987).

¹⁶¹ Deborah Osiro "Somali Pirates Have Rights Too: Judicial Consequences and Human Rights Concerns" 2011 Institute for Security Studies Paper 224 at p8.

persons in custody while awaiting trial has been refined to four key reasons by the ECtHR; the risk that the accused will fail to appear, the risk that there will be interference with witnesses, the risk that the accused will commit serious offences if released and the risk of public disorder.¹⁶² While the first of these reasons may be valid in Kenya where the accused could escape back to Somalia or disappear into the refugee camps in Northern Kenya, the same cannot be said for those detained in both Europe and the USA. Once suspected pirates are detained at sea they are not released, being transferred to shore and prison, then to court, and back to prison when found guilty. Art 10(1) and (2) ICCPR grant the right to be treated with humanity and respect as well as being segregated from convicted persons. As mentioned above in the claims by the suspected pirates lodged in Kenyan prisons, this right is also being breached.¹⁶³

Art 14 of the ICCPR deals with the right to a fair trial. It is here that the suspected pirates transferred from capturing naval ships to a foreign jurisdiction, be it the Seychelles, Mauritius or Kenya are greatly disadvantaged. Under Art 14(3)(a-g), the pirate is entitled to be informed of the charges against him in a language he understands, to have time for the preparation of his defence and time to communicate with a counsel of his own choosing, to be tried without undue delay to be tried in his presence, to have legal counsel assigned to him if he cannot afford to pay for it, to examine witnesses and to have free assistance of an interpreter. Guilfoyle claims that it is highly unlikely that the trials in Kenya breach these Art 14 rights. He states that trials begin in as little as six weeks, the suspected pirates are represented by local lawyers (often with foreign legal assistance), translators are provided by capturing States and that the Judiciary has been brought to a higher standard and that in some cases diplomatic observers are present.¹⁶⁴ While all these things may be so, from the suspected pirates perspective he is being tried in a foreign court and having to rely on the impartiality of a translator to translate the entire proceedings. Built in to the right of a fair trial is the guarantee that the accused will not be compelled to

¹⁶² Ashworth, above n 155 at p30.

¹⁶³ Gathii, above n 139 at p432, Kontorovich, above n 145.

¹⁶⁴ Guilfoyle, above n 144 at pp151-152.

testify against himself or confess guilt, Art 14(3)(g) ICCPR. This guarantee has been implied into Art 6 of the ECHR.¹⁶⁵

Ashworth would argue that the process is extremely out of balance as far as the power differential between suspect and the prosecution arm is concerned.¹⁶⁶ In essence those prosecuting piracy have at their very fingertips it would seem all the power of the world community endorsed at the highest levels by the UN and the Security Council. The suspected pirate in contrast would appear to be isolated and restricted in the resources that he can bring to his defence.

¹⁶⁵ *John Murray v U.K.* (1996) 22 EHRR 29 para. 45, cited by Ashworth, above n 155 at p18.

¹⁶⁶ Ashworth, above n 155 at p9.

23 Is there liability for the State responsible for the destruction of the fishing boats when the suspected pirates are released without being charged?

The UNCLOS Art 110(1)(a) provides for a right of visit for warships on the high seas where there is a reasonable ground for suspecting that a ship is engaged in piracy. This article is further reinforced by the UNSC in some of its resolutions that state,

*'Renews its call upon States and regional organizations that have the capacity to do so, to take part in the fight against piracy and armed robbery at sea off the coast of Somalia, in particular, consistent with this resolution and international law, by deploying naval vessels, arms and military aircraft and through seizures and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use.'*¹⁶⁷

There is no guidance as to what might constitute a 'reasonable ground' although from an example it appears that being in the vicinity of an area where piracy has been carried out would be sufficient.¹⁶⁸ This level of behaviour is further amplified by the case of the *INS Tabar*, mentioned above, where the ship concerned was described as a pirate vessel in 'description and intent.'¹⁶⁹ While this may be helpful it is doubtful that the description of the ship alone could be matched to the definition of a 'Pirate ship' as stated in the UNCLOS Art 103,

'A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been

¹⁶⁷ *United Nations Security Council Resolution SC Res. 2077 S/RES/2077 (2012) operative article 10 as an example. (Author emphasis added).*

¹⁶⁸ Matteo Crippa "Is there a liability for the Destruction of Suspected Pirate Skiffs?" (2013). Citing EUNAVFOR and Combined Task Force 151 reports.

¹⁶⁹ Valencia and Khalid, above n 119 at p4.

used to commit any such act, so long as it remains under the control of the persons guilty of that act.’

The mental element of the definition would need to be abundantly apparent from the manner of the ship. That it is alleged that shots were fired at the *Tabar* would go some way to support the ground that there was an intention to commit a criminal act, it just might not have been piracy. If that criminal act fell outside the right of visit granted under the UNCLOS Art 110 then there would be no grounds for the action taken by the *Tabar* unless the ship was stopped and significant enquiries made. The intention of those that fled the incident, the alleged pirates, could have been to do with arms smuggling or people trafficking, neither of which grant a right of visit under the UNCLOS although there may be a right under other conventions if both parties are signatories.

The *Enrica Lexie* incident described below indicates that a ‘reasonable ground’ could be as little as a being a fishing boat.¹⁷⁰

Should it be proven that there were no grounds for suspecting that the ship stopped was a pirate ship, as appears the case in the EUNAVFOR incident referred to above, then under the UNCLOS Art 101(3) the flag State could apply on behalf of the ship stopped for compensation. Once again this would prove hard to achieve at this current point in time as the State of Somalia is still recovering from 23 years of turmoil and bringing action against some of the worlds largest economies who are reputedly trying to help them would be a significant request at this point in time.

¹⁷⁰ Discussed below.

24 Are those that kill the pirates and the innocent fishermen held to account?

It is not as though the wrongful death of either a pirate or an innocent person suspected of piracy is not going to happen. There have been several recorded incidents. These are just examples of what has happened. An alleged pirate was reportedly killed¹⁷¹ in incident and an innocent fisherman was killed when shot by Italian Marines who were on board a merchant ship, the *Enrica Lexie*.¹⁷² Add to these incidents the video clip of the *Avocet* security guards shooting at a skiff that crashes into the side of the ship and prior to that, the incident involving the *Almezaan* in which one of the suspected pirates was killed.¹⁷³ Apart from the incident involving the *Enrica Lexie* there has been no thorough investigation of the circumstances and no court hearing to adjudicate on the evidence. Guilfoyle suggests that should there be a failure to investigate wrongful killings there may be grounds for attribution of State responsibility.¹⁷⁴

While the security guard may be subject to a multiplicity of jurisdictions, flag State, nationality state, flag State of the vessel fired on and the State of the security company; there is little direction as to which State would take precedence in the case of a wrongful killing. Guilfoyle thinks that is a practical question in the nature of a lottery won by the State that takes the offender into

¹⁷¹ Fox news Private Guards Kill Somali Pirate for the First Time 24 March 2010.

<http://www.foxnews.com/world/2010/03/24/private-guards-kill-Somali-pirate-for-first-time>.

¹⁷² James Brown *Pirates and Privateers: Managing the Indian Ocean's Private Security Boom* (Lowy Institute for International Policy, Sydney, 2012) at p10. The *Enrica Lexie* is an Italian bulk carrier that had embarked a detachment of Italian Marines as a Vessel Protection Detail. The Marines were still employed by the Italian Government as part of the Italian military and so liability would devolve to the state. This incident has resulted in the recall of the Italian ambassador to India and the eventual imprisonment of the marines in an Indian prison awaiting trial on charges of murder.

¹⁷³ EU NAVFOR, "Pirate Dies in Attempted Hijacking –EU NAVFOR Detains Pirate Action Group" 24 March 2010. Cited in Priddy and Casey-Maslen, above n 116 at p843.

¹⁷⁴ Douglas Guilfoyle "Shooting Fishermen Mistaken for Pirates: Jurisdiction, Immunity and State Responsibility" (2012). His view is supported by James Crawford and Simon Olleson "The Nature and Forms of International Responsibility" in Malcolm Evans (ed) *International Law* (3rd ed, Oxford University Press, Oxford, 2010) at p 454.

custody first.¹⁷⁵ In the *Enrica Lexie* quoted above, there was a definite action by the Indian Government to seek the apprehension of those responsible for the killing under the territorial principle discussed further below, as the victim was on a vessel registered under an Indian flag.¹⁷⁶ That the Italian ship ventured into Indian waters was a factor that also gave India jurisdiction to act. That situation may have been easier to resolve as the offenders in this case were working for the Italian government and there were clear lines of State authority and responsibility back to the Italian Government. However compare this to the *Tabar* incident mentioned above.¹⁷⁷ There is no evidence of thorough investigation by the Indian Navy as to the circumstances of the killing and it would appear no credible witnesses. It is much less so in the first case of the killing of the Somali pirate. As to which State prosecutes the unfortunate security guard responsible for the killing of the pirate it comes down to a matter of which State, either Somalia, unlikely, or the flag State of the vessel from which the shot or shots were fired.¹⁷⁸ Art 94(4)(b) of the UNCLOS requires that each ship be in charge of a master and certified officers. The SOLAS Annex and general provisions Chapter XI-2 Special Measures to Enhance Maritime Security regulation 8(1) makes it clear that the Master shall not be constrained in matters, which in his judgment are necessary to maintain the safety and security of the ship. The GUARDCON contract for the Employment of Security Guards on Vessels at Part II Section 4(8) clearly apportions responsibility for the safe navigation and overall command of the vessel to the Master. However, with regard to the use of force, (Section 4(8)(b)), the team leader is required to advise the Master when he is going to engage the Rules for Use of Force. Section 4(8)(c) leaves the responsibility for the use of force with the security personnel. The Masters retention of authority is reinforced under Section 4(8)(d) as to ordering of a cessation in firing under all circumstances but does not override the individuals right to protect them self in a case of self-defence. The control over

¹⁷⁵ Guilfoyle above n 174. If the matter is ever actually investigated.

¹⁷⁶ It would also be possible for India to claim jurisdiction based on the passive personality principle, also discussed below.

¹⁷⁷ Valencia and Khalid, above n 119.

¹⁷⁸ Guilfoyle, above n 174

the ship by the master is restated in the IMO guidance on the deployment of armed security personnel.¹⁷⁹ The US has issued Port Security Advisory Guidance on Self Defence and Defence of others by U.S. Flagged Commercial Vessels Operating in High Risk Waters¹⁸⁰ where the ship's masters' authorisation is needed if the action is taken in defence of the cargo or ship, but is not required in defence of the person or of others. Returning to the *Avocet* incident for a moment, the Master of the *Avocet* would be responsible at a minimum for returning to check on the safety of the crew of the skiff that was fired on and where practicable to render the necessary assistance under Art 98(1)(a) – (c). That there is no indication of this happening or any investigation into the circumstances by the IMO, in itself condones this type of lack of responsibility.

So were these actions justified as self-defence and whose law of self-defence applies? Presumably it would be the flag State laws of self-defence, but it could also be the law relating to self-defence for the nationality of the security guard, the security company, the owners of the vessel, the territorial waters where the incident occurred and on to a list that is almost endless and certainly not clear at any given time. The personal doctrine of self-defence would limit the right of security guards to deal only with attacks on ships and not to pre-emptive firing shots at the suspected pirates to keep them from committing an act of piracy.

The two incidents highlighted above, regarding the death of possibly innocent seamen, show the lack of understanding of the legal consequences of utilising Private Security Companies, (PSC), as well as the significant legal complexities that arise following the death of a pirate or suspected pirate.¹⁸¹

¹⁷⁹ International Maritime Organisation MSC.1/Circ.1405/ Rev.2 25 May 2012 at paragraph 5.9 of the Annex.

¹⁸⁰ US Coast Guard and the Department of Homeland Security, Guidance on Self Defence and Defence of others by U.S. Flagged Commercial Vessels Operating in High Risk Waters, Port Security Advisory (3-09), 18 June 2009

¹⁸¹ Fox news, above n 171 where the journalist highlighted the issue of who was responsible for investigating the death of the pirate, the flag state of the shipping company or the flag state of the security guard involved or indeed it could be Somalia if the event occurred in its territorial waters which is unclear from the article.

25 The problems with deployment of Private Security

Companies

As a response to piracy there have been a number of recommendations to merchant shipping lines on to how best to protect the ships sailing through the Gulf of Aden and the eastern reaches of the Indian Ocean. These include the deployment of passive measures, the employment of State defence force personnel as on board security (Vessel Protection Detachments VPD)¹⁸² and the utilisation of Private Military Security Company (PMSC) guards¹⁸³ The employment of either VPDs or PMSCs has generated concern over the precise legal position of either when operating. PMSCs exist in a legal lacuna in some respect, as there are no overarching binding international agreements.¹⁸⁴

A first step towards regulating the PSC industry in relation to Piracy was the formulation of the Montreux Document, which outlines the obligations of countries with private military and security companies in war zones.¹⁸⁵ While piracy off the Coast of Somalia is not a declared war zone, but more of a law enforcement action, the guidelines provide pertinent reading. In 2010 the UN, as a result of a working group developed a draft convention on PMSCs for consideration and action by the Human Rights Council (Draft Convention on PMSCs).¹⁸⁶ The Draft Convention on PMSCs has as its focus the use of PMSCs by States to bolster military forces. The working group identified the gap in the international regulation of PMSCs and the fact that PMSCs have been responsible

¹⁸² Brown, above n 172 at p9.

¹⁸³ The BMP4: Best Management Practices to Deter Piracy off the Coast of Somalia and in the Arabian Sea Area, (2010 Witherby Seamanship International, Edinburgh) Section 8 pg 23.

¹⁸⁴ C Liss "Regulating Private Military and Security Companies at Sea: New Developments and Challenges" (A regional Response to Maritime Piracy: Enhancing Public-Private Partnerships and Strengthening Global Engagement, Dubai, June 2012) at p2.

¹⁸⁵ International Committee of the Red Cross 'The Montreux Document: On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict September 2008.

¹⁸⁶ Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination. A/HRC/15/25 2 July 2010.

for breaches of human rights for which few of the offenders have been held accountable. The working group identified that while PMSCs and contractors have been held accountable within municipal law for some breaches¹⁸⁷ there has been a lack of prosecutions.¹⁸⁸ There is also the International Code of Conduct for Private Security Service Providers (2010), (ICOC).¹⁸⁹ As at the time of writing the ICOC had 708 companies as signatories.¹⁹⁰ The ICOC has as its aim the endorsement of the Montreux Document as well as the Respect, Protect, Remedy framework provided by the Special Representative to the UN Secretary-General on Business and Human Rights, as well as respecting the rule of law and respect for human rights. The IMO have produced a set of guidelines, MSC.1/Circ.1405/Rev.2 for the employment of PMSCs and privately contracted armed security personnel (PCASP).¹⁹¹ The guidelines are not binding and provide what at best could be described as the compilation of general information to be used when employing PMSCs or PCASP. There is an avoidance of any definitive statements regarding liability should there be an incident that involves the taking of life. Generally these documents cover the same basic ground. The respect for human rights, the ability of the security guard to utilise extreme violence in the defence of either himself or of others, and requirements to report incidents of that exercise to competent authorities.

There have been other initiatives designed to strengthen the control of PSCs worldwide including documents such as the Department for Transport, 'Interim Guidance to Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances'.¹⁹² The BMP4: Best Management Practices to Deter Piracy off the Coast of Somalia and in the Arabian Sea Area¹⁹³ identifies a range of possible measures to deter pirate attacks. These measures include, reliance on Naval protection, creating a citadel, or secure area on board

¹⁸⁷ Draft Convention on PMSCs above n 185 at ¶19-20

¹⁸⁸ At ¶36.

¹⁸⁹ The International Code of Conduct for Private Security Service Providers 9 November 2010

¹⁹⁰ www.icoc-ppsp/uploads/Signatory_Companies_-_August_2013_-_Composite_List2.pdf

¹⁹¹ MSC.1/Circ.1405/Rev.2 25 May 2011.

¹⁹² Department for Transport, 'Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances' November 2011.

¹⁹³ The BMP4 above n 183.

the ship, the use of non-lethal defences (Long Range Acoustic Devices, Fire hoses directed at the pirates), Unarmed shipboard guards and the deployment of armed guards or military teams from the flag State defence forces. While each of these measures have had some success in reducing pirate attacks the most problematic appears to be the deployment of armed guards aboard merchant vessels. These armed guards present a number of concerns for the shipping companies ranging from the increase of risk to ship's crews through to liability and insurance issues in the case of death or injury and the complex legal issues associated with employing lethal force at sea.¹⁹⁴

As an example of the type of incident these measures are designed to address there is a video recording of an incident on board the *Avocet*.¹⁹⁵ This video shows guards on board the ship shooting at an approaching skiff until it hits the side of the ship.

What can be said in sum is that there is no definitive binding international legislation or regulation to control the actions of PCASP on board merchant ships as they pass the coast of Somalia. There is reluctance by ships to report incidents that occur as stopping the ship costs significant time, which amounts to money. There are questions of responsibility and liability that shipping companies would no doubt wish to avoid. The definitive answer to the question is that there have been innocent fishermen and suspected pirates killed. There have been some investigations and self-defence has been claimed as the reasons behind the shootings. There are unsubstantiated allegations that there are a number of suspected pirates being killed. These incidents are easy to avoid as they happen in the main on the high seas beyond the scope of any State to actively and willingly intervene. Unless there is sufficient corroborated evidence of these acts supplied by an independent source, neither pirates nor security companies, the likelihood of anyone being held to account is very slim.

¹⁹⁴ Brown, above n 172 at p6.

¹⁹⁵ M Bockmann and A Katz "Shooting to Kill Pirates Risks Blackwater Moment." (2012) Washington DC. There is insufficient background to the video footage to form an opinion as to what has happened prior to and post the shooting, but there is sufficient to form the opinion that the moves to regulate the PMSC industry may be timely.

26 Conclusion

As stated in the introduction piracy is not a new phenomenon. The conditions that exist today and the way in which pirates operate have not changed since the golden age of piracy. What has changed is the global perspective on human rights and the way in which criminals are dealt with. Where once it was acceptable to 'attack' pirates with warships, capture and try them and dispense justice on the high seas, now it is expected that the pirate will face a criminal court where justice will be subject to process and procedure.

Piracy was and is about nothing more than the control of property. As such it is a criminal offence and should be dealt with by way of Police action. Patrolling controls piracy, policing eradicates it.¹⁹⁶ If Police action is initiated in a clear and precise manner from the U.N. Security Council down then those involved will know what their limitations are and the procedures to take. This will condition the terminology used making it clearer. The use of terms such as 'fight' and 'war' on piracy bring the wrong mindset to the problem.¹⁹⁷ Guilfoyle quite correctly refers to the utilisation of 'policing resources,' which creates a mindset of effective patrolling, evidence gathering for court prosecution and the eventual prosecution of pirates.¹⁹⁸ Navies have had to be trained in a range of protocols to deal with the apprehension of pirates to ensure evidence is not lost or presented in a way that meets the requirements of the prosecuting state¹⁹⁹. Piracy provisions of UNCLOS are not working.²⁰⁰ More because the provisions were created at a time when piracy was rife and not largely historical and irrelevant to the modern pirate working out of Somalia, Nigeria or Asia than for any other reason.²⁰¹

¹⁹⁶ Martin Murphy "Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?" in Peter Lehr (ed) *Violence at Sea: Piracy in the Age of Global Terrorism* (Taylor & Francis Group, New York, 2007) at p168.

¹⁹⁷ Sterio above n 67 at p463.

¹⁹⁸ Guilfoyle, above n 120 at p770.

¹⁹⁹ At p781.

²⁰⁰ Murphy, above n 196 at p172.

²⁰¹ At p172.

Universal jurisdiction is not the be all and end all to the scourge of piracy. Kontorovich²⁰² describes universal jurisdiction as failing to end impunity for the crime based on the low use rate of 1.47 per cent for prosecutions of piracy. This is in contrast to the usage by the Western world of universal jurisdiction for crimes of human rights abuses located in developing States.

The serious consequences of piracy require a more precise, principled definition of what constitutes an act of piracy.²⁰³

Extended regional cooperation is a possible solution to the problem. Prisons and speedy appearance before courts are needed to avoid breaches of human rights. There needs to be greater involvement of impartial bodies to ensure that those apprehended are accorded all the protections available to them.

If the navies and armed forces of the global community are insufficient to provide security for ships transiting piracy prone areas and there is a reliance on PMSC to fill the void, then there needs to be stringent regulation and control of those companies. Clear, enforceable regulation that sets stringent boundaries as to the action that can be taken to deter pirates needs to be created and promulgated. Accountability for those, either within the PMSC or the military needs to be as balanced as that for the pirates and any transgressions need to be investigated and the offenders brought to justice.

Piracy has never gone away. Indeed it could be classified as the world's third oldest profession. What is required is constant attention to the conditions that stimulate piracy along with constant attention to the legislation designed to bring to justice those that perpetrate it. While the actions of pirates occur mostly out of view of the world, there is no need for pirates to be out of the worldview.

²⁰² Eugene Kontorovich and Steven Art "An Empirical Examination of Universal Jurisdiction for Piracy" 2010 104 A. J. I. L. 436 at p453.

²⁰³ Bento, above n 19 at p414.

Chapter 6

27 Conclusion

I am the Horn of Africa
My silent cries go unheard
My tears unwiped, my eyes blurred
I am Somalia
(Helwaa)¹

27.1 Failed States

If all the attention that has been focussed on Somalia over the last twenty years by the international community has failed to solve the failed state crisis and has, perhaps, contributed to its ongoing instability, it is not beyond the realm of possibility that the wrong focus has been adopted.

In essence, the outside world wants to see what it knows and understands, a sovereign and central government. The Somalis see this not as enhancing their life but as a direct threat to their peace.² The State is seen as dominating, enriching, and empowering those who control it and exploiting and harassing those without control.³

The response to the Somali crisis is the result of a misreading.⁴ This misreading is based largely on a Western philosophy of war and peace and control by a central government. Any other variation is too challenging for the West to comprehend. This creates enormous problems when a solution for a failed state

¹ Cachia, above n 1 Chapter 1.

² See Menkhaus, above Chapter 2 n128 at p84.

³ H Richardson "Failed States, Self Determination and Preventive Diplomacy: Colonialist Nostalgia and Democratic Expectations" 1996 10 Temp. Int'l Comp. L. JI; at ; at p28.

⁴ Richardson, above n2 at p77.

is crafted externally to the actors within the state. The cost of this failure by the West is enormous, both to itself and to those states it is hoping to help⁵. Much of the programme for rebuilding Somalia is driven by the US's fear of a collapsed state becoming a haven for terrorist activity which will be carried out against its assets and citizens.⁶ If one analyses this approach, it has nothing to do with the people of Somalia being helped into a more stable environment, it reflects more of the external actors, acting for their benefit. This is little difference between this approach and that taken by the colonists.

The term 'failed State' has no legal consequences and is nothing more than a political descriptor of a state that lacks effective government. There are consequences to the use of the term. These are more of a practical nature than a legal consequence, although some of the consequences have legal implications. Amongst these is the inability of a state to form international relationships, the lack of standing in courts, and the loss of voting power within international institutions.

The inability of the international community, including international institutions, to conceive of something, other than a functioning State, as part of the community, is a hindrance to the efficient, legitimate, processes required to assist the State in reconstituting itself in a functioning, non-threatening manner.

While this model remains the only acceptable version there will continue to be those, who for whatever reason, geographic, political, religious and sociological do not measure up to some ill defined value laden model.

While the colonists may have drawn boundaries that ignored the make up of tribal institutions and their traditional homelands that is not the cause of State failure.

⁵ Richardson, above n2 at p77.

⁶ Thomas Englehardt *The United States of Fear* (Haymarket Books, Chicago, 2011). The thesis of this book is that the United States lives in a state of perpetual fear.

27.2 Illegal Fishing

A consequence of a State lacking effective government is the inability to provide protection for State resources. In the case of Somalia that has meant the 3000M coastline is left unprotected and the resources that dwell within the territorial waters are open to any to fishers both legal and illegal that want to reap a substantial harvest.⁷ That there is international law that exists to stop illegal fishing is not sufficient to bring it to a halt. It falls on those entrusted with governance at State level, outside Somalia, that make the decisions about the deployment of resources that put in to effect the existing law. There are however problems with that law.

The central focus of UNCLOS is not fishing. There is very little explicitly fishing focused content and considering that fishing is a major sea activity it is at best puzzling why there is this lack of focus. This gap is filled through the use of other agreements, which attempt to fill those inadequacies. The FSA aims to address the inadequacies of high seas fisheries management. Issues regulated by the FSA include unregulated fishing, overcapitalisation and excessive fleet size, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases and lack of cooperation between states.⁸

RFMO focus more on the HS and are species specific. The major drawback with these agreements is that they do not take account of other valuable species that may be fished for, or the possibility that by-catch is dumped and damaging to the overall fishing resource. RFMOs are also beset with the lengthy time frame applied to their decision making processes.⁹ The major problems that Somalia faces with these agreements is that the relevant RFMOs came into being after the collapse of the Barre government and therefore Somalia is not a contracting party and secondly, it is specifically for tuna type species with other lucrative fish stocks such as lobster and shrimp - being overlooked. One of the main drawbacks of RFMO is the length of time that it takes to make any sort of

⁷ Tharoor, above Chapter 3 n 14 at p2. The value of fish stocks taken from the waters of Somalia by foreign illegal fleets is estimated in excess of USD300 million.

⁸ FSA, above Chapter 2 n 69 at p2.

⁹ Stokke and Vidas, above Chapter 4 n 84 at p26.

decision as the bodies normally meet once every 12 months and reaching agreement can be a process drawn out over several years. This problem of glacial decision-making is compounded by the fact that not even all members adhere to the conservation and management measures, nor fulfil their responsibilities as flag States. The prohibition on non-flag States investigating the breaches of the international fishing regime and the utilisation of FOC States are a major contributor to the ease of operation by illegal fishers.¹⁰ While seemingly unrelated this particular issue is linked to the concept of sovereignty discussed in Chapter 2 on failed States as states try to protect the 'sovereignty' of 'their' vessels from the exercise of sovereignty by other states.

A lack of political will to reign in both nationals and national fishing fleets that are determined to continue illegal fishing contributes significantly to the problem of illegal fishing.¹¹

Soft law approaches, FAO IPOA-IUU being one, may have been an inducement to sign up to less onerous conditions to control illegal fishing. The scale of illegal fishing internationally is so large and detrimental to conservation measures that try to protect fish species from extinction, that any measure that allows states to opt out or diminish their commitments no longer has a part to play in the international framework. Illegal fishing is viewed as a conservation issue instead of a combination of conservation and transnational criminal law problem. Until the perspective is changed, the problem will continue.

PSCs involved in establishing maritime security for Somalia and its regions have met a number of logistical problems that have reduced the effectiveness of the companies in supplying quality security for the fisheries off Somalia's coast and reducing the incidents of illegal fishing. The major legal hurdle is establishing the extent of legitimate authority that the PSCs have to act on behalf of non-sovereign entities in carrying out basic governmental tasks in the form of security over national fisheries. There has been significant discussion regarding

¹⁰ Flotham and others, above Chapter 2 n 8 at p14.

¹¹ Cantrell, above Chapter 3 n 57 at p400.

the actions of pirates as to the possibility of their actions being sanctioned in a form similar to the privateers of old.¹² However, the Paris Declaration still stands as outlawing the practice.

27.3 Hazardous Waste Dumping

UNCLOS provides the framework for the prevention of hazardous waste dumping in the sea. It relies on the strength of supporting international regulation and standards to do its work. If these standards and regulations do not fulfil their role than UNCLOS fails in its role. The LDC and the Protocol support the UNCLOS. However, both of these agreements failed in their role to prevent hazardous waste dumping. The due diligence function of the LDC has allowed waste to be dumped off Somalia's coast because the PIC requirement was not fully explored by the exporting state. The Protocols lack of compliance and political will to enforce or to hold others to account has also contributed to the dumping problem. The Basel Convention does not impose an outright ban on the transport of hazardous waste and the political will required to put in place the ban amendment that precludes the export of waste from OECD to non-OECD countries, would see the waste stopped from being exported to developing states. The Basel Convention has been criticised because it does not criminalise hazardous waste exports, it only attempts to regulate the trade.¹³ Criticism also centres on the notification procedure as the illegal traders exploit the gaps in it.¹⁴ Like the illegal fishing, the biggest threat to the hazardous waste regime is the illegal traffic.¹⁵ In part, this is due to the inefficiencies of the both the Basel Convention Secretariat and Interpol along with the argument of developing States that view the criminalisation of the trade as an affront to their

¹² Arky, above Chapter 3 n 27 at p26 and Bawumia and Sumaila, above Chapter 3 n **Error!**

Bookmark not defined.¹³ at p7.

¹³ Clapp, above Chapter 3 n 11 at p26. This failure to ban the trade in hazardous waste outright was in spite of the best efforts of the African states and developing states to achieve a total ban. This would suggest that the power of the lobby groups exceeded that of the African States and would possibly reinforce the neo-colonial view of Africa.

¹⁴ Sanchez, above Chapter 3 n 32 at p145.

¹⁵ Sanchez, above Chapter 3 n 31 at p145.

sovereignty, as decisions as to what they can and cannot import are made externally via treaty.¹⁶

The notion that all States are interdependent needs to be realised by the global community of States. In doing this, States would acknowledge that each is a small part of a greater environmental system. There is no temptation to knowingly allow pollution to occur to another State. The motivation to produce less waste within the borders of each State takes on more significance and the oceans have a chance to recover. States acting to preserve the good of the community are also preserving their own individual good. Non-parties, like Somalia, benefit from the collective actions of States against those who actively seek out States where enforcement is lax in order to dump waste.

27.4 Piracy

Piracy is not a modern phenomenon. It is possibly the world's third oldest profession. Two things have changed however, the technology and the legitimate treatment of pirates. The global perspective on human rights influences the approach taken to prosecute them. Where once it was acceptable to 'attack' pirates with warships, capture and try them and dispense justice on the high seas, now the pirate faces a criminal court where justice will be subject to process and procedure. The law that supports the prosecution is located in UNCLOS and in national legislation. It is in these two areas where definitional problems occur. The serious consequences of piracy require a precise definition of what constitutes an act of piracy.¹⁷ The definition of piracy is located in a time when piracy was largely historical. The spate of activity off Somalia's coast has emphasised the definitional shortcomings.¹⁸ Universal jurisdiction is not the be all and end all to for piracy. It is failing to end impunity for the crime based on the low usage rate of 1.47 per cent for prosecutions of piracy.¹⁹

¹⁶ Clapp, above Chapter 3 n 10 at p111.

¹⁷ Bento, above Chapter 5 n 19 at p414

¹⁸ Murphy, above Chapter 5 n 192 at p172.

¹⁹ Kontorovich and Art, above Chapter 5 n 198 at p453.

Piracy was and is about nothing more than the control of property. As such it is a criminal offence and should be dealt with by way of police action. Patrolling controls piracy, policing eradicates it.²⁰ Police action requires clear and precise legislation to support it. This guides those involved who know their limitations and the procedures to take. The use of terms such as 'fight' and 'war' on piracy bring the wrong mindset to the problem.²¹ Utilisation of policing resources creates a mindset of effective patrolling, evidence gathering for court prosecution and the eventual prosecution of pirates.²²

While the use of armed PMSC is applicable on land where oversight is readily available, it is not an acceptable answer on the HS where a number of factors culminate in poor decision-making. A consequence of this is extra judicial killings of pirates. These killings occur on HS beyond any official oversight and with apparent impunity.²³ The lack of binding international agreements that cover the use of PSMC creates a legal loophole. States may not be accountable for the actions of the security guards.

The action of naval patrols to inhibit piracy has been one sided as far as the local Somali people are concerned. While there have been some eight UNSCRs extending enforcement powers into Somali waters to control piracy there have been a limited number of UNSCRs dealing with the matters relating to IUU Fishing. The first of these, UNSCR 1897 appeared in 2009.²⁴ Far from extending to the cooperating States in the pursuit of piracy an extension into the sovereignty of Somalia to protect fisheries and prevent hazardous waste dumping, this resolution at Paragraph 5 acknowledges Somalia's rights to its natural resources offshore. It then goes on to identify the importance of preventing illegal fishing and illegal dumping and calls on States to offer technical assistance to Somalia and regional authorities, as well as nearby States to enhance capacity to ensure coastal and maritime security. The article then

²⁰ Murphy, above Chapter 5 n 192 at p168.

²¹ Sterio, above Chapter 5 n 67 at p463.

²² Guilfoyle, above Chapter 5 n 117 at p770.

²³ The problems with deployment of Private Security Companies, above Chapter 5, §7.

²⁴ *United Nations Security Council Resolution 1897*, above Chapter 2 n 165 paragraph 5.

goes on to reinforce that this is more about combating piracy and armed robbery and any efforts should be coordinated through the Contact Group on Piracy off the Coast of Somalia. By contrast to piracy, the acknowledged catalysts for piracy are dealt with by way of the compilation of reports whose recommendations are not followed up. States are urged to 'positively consider investigating' hazardous waste dumping some 14 years after it was first notified to the UN that there was a problem.

The international effort is focused on piracy as the disease and not on what is the disease, which is, the loss of effective government, illegal fishing, and toxic waste dumping. There appears to be sufficient international law to support Somalia's cause in stopping the IUU and waste dumping, however, it is also a hindrance in that it requires State to State action which is not possible for a failed State or an autonomous State that is not recognised by the international community. The loss of effective government aside the other issues affecting Somalia are all of a policing nature. Illegal fishing is a crime perpetrated by those wishing to benefit from lax laws and enforcement, as is hazardous waste dumping. Piracy is also a crime, and all three crimes need equal treatment and apportionment of resources.

27.5 Conclusion

The global community has responded to the loss of effective government in Somalia. The problem is that the response is limited to the self-interest of the developed world against the interest of the developing world, in this case Somalia. Cooperation amongst the international community is a force for good. Unfortunately, this cooperation currently reflects the self-interest of the activated parties. A change needs to occur where cooperation focuses on the interest of all for the benefit of all.

On a positive note as can be seen from the discussion above Somalia is taking steps to rectify the problems it faces or has caused through not having clearly established maritime zones that comply with the current international standards. These steps, and the election of a President, indicate that matters are

moving further towards stability, which will in the longer term affect the possibility of a resurgence in piracy and better controls over territorial waters to prevent illegal fishing and further hazardous waste dumping.

In conclusion it can be stated that the three major issues that have created problems for Somalia and the international community revolve around the concepts of a state, sovereignty and the necessity to treat breaches of agreements relating to both illegal fishing and hazardous waste dumping as transnational criminal law offences and police them accordingly. The response of the global community to piracy, which is treated as a crime, is in stark contrast to the responses to the issues of illegal fishing and hazardous waste dumping which are not treated as crimes. The lack of criminalisation of illegal fishing and hazardous waste dumping to the same extent as piracy is criminalised is masked by the self-interest of the global community.

Looking to the future, further research is required into alternatives for the concepts of a state and what constitutes sovereignty. As the world appears to contract, in the sense that State borders are becoming far more porous with technological advances and the reach and influence of international corporations, the exclusive control States once had is being limited. As more territories seek to become independent of their dominant partners the likelihood that the number of separate States, with a strong nationalist flavour, will expand and borders, once seen as permanent, will begin to crumble. Newly won sovereignty for these new territories having been hard won will not be easily surrendered. Therefore any new concept of sovereignty will have to take this into account. It is not suggested that there is a move to a one-world government, however, it is suggested that the problems facing the planet regarding resources are beyond the scope of any one country to deal with inside its borders. The discussion of a one-world government therefore needs to move from the fringes to a more central and academically examined proposition. The international fishing regime could well be due an intensive overhaul and the creation and institution of a single piece of international law that combines the existing framework into a comprehensive single treaty under a central UN directorate

with enforcement powers to cover those areas beyond current State jurisdiction. Like the international fishing regime, hazardous waste dumping could benefit from a singular all encompassing agreement that replaces the existing regime. It is important that any future agreement regarding hazardous waste dumping is in effect a total ban on the use of the sea as an easily accessible facility to dispose of waste generated on land. It will be important to resolve issues of liability and compensation and have these embedded within the legislation instead as being tacked on as area to be worked on at a later stage. As previously discussed, piracy is not about to disappear. It is therefore important that the international anti piracy regime becomes a more comprehensive whole and problems associated with its current state, lack of clarity around its definition, the validity of third party State courts and transfer agreements, can be solved. The thorny issue of the use of Private Armed Security Guards and their responsibility and the liability of shipping companies, security companies and States for wrongful killings needs to be brought under an expansive single document that is agreed to by States and not signed up to by security companies. Security companies will need to sign a domestic version of that will bind them. At the moment there are too many gaps in the law that allows these wrongful killings to take place without accountability.

As a last note and certainly not something of a legal nature, however, as a step to the reconstruction of Somalia and its future, those States who have used Somalia for their own ends, the colonists and Cold War Powers, might consider offering an apology to the people and government of Somalia to heal the past and help clear the way for a better future.

Annex 1

Recognition of States

Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (16 December 1991)

In compliance with the European Council's request, Ministers have assessed developments in Eastern Europe and the Soviet Union with a view to elaborating an approach regarding relations with new states.

In this connection they have adopted the following guidelines on the formal recognition of new states in Eastern Europe and in the Soviet Union:

The Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognize, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.

Therefore, they adopt a common position on the process of recognition of these new States, which requires:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement
- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability

- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes.

The Community and its Member States will not recognize entities which are the result of aggression. They would take account of the effects of recognition on neighbouring States.

The commitment to these principles opens the way to recognition by the Community and its Member States and to the establishment of diplomatic relations. It could be laid down in agreements.

Annex 2

Recognition of States

Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991)

The European Community and its Member States discussed the situation in Yugoslavia in the light of their Guidelines on the recognition of new states in Eastern Europe and in the Soviet Union. They adopted a common position with regard to the recognition of Yugoslav Republics. In this connection they concluded the following:

The Community and its Member States agree to recognize the independence of all the Yugoslav Republics fulfilling all the conditions set out below. The implementation of this decision will take place on 15 January 1992.

They are therefore inviting all Yugoslav Republics to state by 23 December whether:

- they wish to be recognized as independent States
- they accept the commitments contained in the above-mentioned Guidelines
- they accept the provisions laid down in the draft Convention – especially those in Chapter II on human rights and rights of national or ethnic groups – under consideration by the Conference on Yugoslavia
- they continue to support
- the efforts of the Secretary General and the Security Council of the United Nations, and
- the continuation of the Conference on Yugoslavia.

The applications of those Republics which reply positively will be submitted through the Chair of the Conference to the Arbitration Commission for advice before the implementation date.

In the meantime, the Community and its Member States request the UN Secretary General and the UN Security Council to continue their efforts to establish an effective cease-fire and promote a peaceful and negotiated outcome to the conflict. They continue to attach the greatest importance to the early deployment of a UN peace-keeping force referred to in UN Security Council Resolution 724.

The Community and its Member States also require a Yugoslav Republic to commit itself, prior to recognition, to adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community State and that it will conduct no hostile propaganda activities versus a neighbouring Community State, including the use of a denomination which implies territorial claims.

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